APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6041

DAVE PERNELL,

Petitioner,

—v.—

SOUTHALL REALTY,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR CERTIORARI FILED JANUARY 13, 1973
PETITION FOR CERTIORARI GRANTED APRIL 2, 1973

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TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

Superior Court of the
District of Columbia

July 20, 1971	Complaint filed.
August 9, 1971	Answer and jury demand filed by defendant.
August 9, 1971	Jury demand stricken, and case continued to August 16, 1971 for trial. Judge Ryan.
August 16, 1971	Trial held. Judgment for plaintiff for possession. Oral motion by defendant counsel for stay pending appeal denied as frivolous. Judge Ryan.
August 20, 1971	Military affidavit filed. Judgment for plaintiff for possession and costs. Writ of restitution issued. Writ of restitution returned.
August 25, 1971	Notice of appeal filed by defendant.
August 26, 1971	Hearing held to determine amount of bond. Bond set at one thousand dollars ($1000.00). Judge Ryan.
August 31, 1971	Defendant's emergency motion to stay execution of writ of restitution to enable defendant to obtain amount of bond, heard and denied, Judge Harris.
September 3, 1971	Defendant's further oral motion for emergency relief pending appeal (and contemplated dismissal of appeal) said request for relief being predicated principally on attempted tender of past due rent (of which $325.00 was represented solely by expressed intent of Social Services to make such payment in the future), heard and denied. Judge Harris.

RELEVANT DOCKET ENTRIES

Superior Court of the
District of Columbia

September 23, 1971	Application for leave to proceed on appeal without prepayment of costs filed by defendant.
September 23, 1971	Affidavit in support of motion to proceed on appeal without prepayment of costs filed by defendant.
September 28, 1971	Application for leave to proceed on appeal without prepayment of costs denied. Judge Ryan.
November 9, 1971	Statement of reason pursuant to Rule 23A signed and filed in compliance with with D.C. Court of Appeals order filed 11-8-71. Judge Ryan.
December 2, 1971	Statement of evidence and proceedings filed by defendant.
December 7, 1971	Objections to defendant's proposal filed by plaintiff.
December 27, 1971	This is not approved as a statement of evidence and proceedings since it does not conform to the rules, is actually an argumentative pleading by counsel, and even has the rules (sic.) of the parties confused. Judge Ryan.
December 27, 1971	Statement of evidence and proceedings filed. Approved (with deletions of matters which are actually argument). Judge Ryan.
December 27, 1971	Statement of proceedings (with deletions) approved and filed herein. Judge Ryan.

RELEVANT DOCKET ENTRIES

Superior Court of the District of Columbia	
May 16, 1972	Remand hearing held pursuant to D. C. Court of Appeals remand order filed 5-10-72 remanding this cause to the trial court for further finding with respect to payment of jury fee. The trial court finds that the jury fee was paid. Order signed and filed herein. Judge Ryan.
May 16, 1972	Order of Judge Ryan filed. Ordered that the record herein be supplemented to include a finding that the jury fee was paid by defendant, and it is further, ordered that the clerk transmit this order and supplemental record to the D.C. Court of Appeals. Judge Ryan.
May 18, 1972	Supplemental record certified to D.C. Court of Appeals per above order and that court's order of 5-10-72.
District of Columbia Court of Appeals	
August 25, 1971	Motion of appellant for summary reversal or alternatively for stay pending appeal filed.
August 25, 1971	Order denying motion of appellant for summary reversal, stay of judgment granted until 4:00 P.M., Friday, August 27 and record deemed remanded to trial court with directions. Judges Fickling, Kern and Reilly. Judge Kern did not participate in this order.
August 27, 1971	Motion of appellant for reversal of order setting supersedeas bond or for reduction of bond filed.

RELEVANT DOCKET ENTRIES

District of Columbia
Court of Appeals

August 27, 1971	Order denying motion of appellant for reversal of order setting supersedeas bond, etc. filed. Judges Fickling, Kern and Reilly. Judge Kern did not participate in this order.
August 31, 1971	Motion of appellant for reconsideration of order denying appellant's request for reduction of bond filed.
August 31, 1971	Order denying motion of appellant for reconsideration. Judges Fickling, Kern and Reilly.
September 15, 1971	Order filed directing counsel for appellant to show cause if any there be within ten days from the date of this order, why this appeal should not be dismissed for his failure to file a designation of record, etc.
September 23, 1971	Response of appellant to the order to show cause filed.
October 19, 1971	Motion of appellant for leave to proceed on appeal in forma pauperis.
October 22, 1971	Opposition of appellee to motion for leave to proceed in forma pauperis
November 8, 1971	Order holding motion of appellant for leave to appeal in forma pauperis in abeyance and requesting trial judge to furnish a statement within 10 days. Judges Fickling, Kern and Reilly.
November 10, 1971	Statement of reasons pursuant to Rule 23(a) of trial judge filed per order of November 8, 1971.

RELEVANT DOCKET ENTRIES

District of Columbia
Court of Appeals

November 22, 1971	Order vacating court's order of September 15, denying motion for leave to proceed in forma pauperis and extending time for ten days to file designation of record, etc. Judges Fickling, Kern and Reilly.
March 15, 1972	Appellant's brief filed.
April 4, 1972	Appellee's brief filed.
April 21, 1972	Appellant's reply brief filed.
May 1, 1972	Argued before Judges Hood, Kern and Reilly.
May 10, 1972	Order filed remanding record on appeal to trial court with directions to file supplemental record. Judges Hood, Kern and Reilly.
May 18, 1972	Supplemental record filed per order of May 10, 1972.
August 31, 1972	Opinion per Reilly, Chief Judge, filed. Judgment affirming judgment of trial court filed.
September 22, 1972	Mandate issued.

IN THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION, LANDLORD AND TENANT BRANCH
Fourth Floor

613 G Street, Northwest
Washington, D. C.

Southall Realty	*vs.*	Dave Pernell
Plaintiff		*Defendant*
1935 11th Street N.W.		2817 13th Street, N.W.
Address		*Address*

No. L. & T. L 68727-71

COMPLAINT FOR POSSESSION OF REAL ESTATE

DISTRICT OF COLUMBIA, ss:

McGordon Southall being first duly sworn, states that plaintiff is entitled to the possession of premises No. 2817 13th Street N.W. Eight rear of [Illegible] located in the District of Columbia, which the defendant holds without right. The premises are in possession of the defendant, who holds them as a monthly tenant of the plaintiff.

(Here indicate type of tenancy)

If the tenancy is by written agreement or lease, check the following ground or grounds upon which possession is sought:

☒ Defendant's default in the payment of rent, there being now due rent in the sum of $375.00 for the period from 5/10/71 to 8/10/71.

☐ By reason of the following (explain fully): ———
Affiant also states: (Check one of the following)

☐ That a notice to quit has been served upon the defendant as required by law;

☒ That service of a notice to quit has been specifically waived in writing.

Affiant therefore says that plaintiff is entitled to judgment for possession of said property (and for judgment in the sum of $ ———— for rent in arrears) (and for the following personal property located on the premises: ————————————————————) and costs of this suit.

/s/ McGordon Southall
Plaintiff (or Agent)

Subscribed and sworn to before me this —— day of Jul. 20, 1971.

RALPH W. JORDON
Deputy Clerk
Notary Public, D. C.

SUMMONS

You are hereby summoned and required to appear in Landlord & Tenant Court, Room 302, 613 G Street, N.W. (Third Floor) at 9:00 a.m. on [Illegible] 19— to answer your landlord's suit for possession of the above premises (and for a money judgment in the amount stated above) (and for the personal property listed above).

If you cannot appear in court at this time, you may come to Room 302, 613 G St., N.W. (Third Floor) at 9:00 a.m. any Monday through Saturday or at 6:30 p.m. any Wednesday *prior to the above date* and request the judge to order our case set down for trial by the judge at the first day time or evening session of the court following the date specified above.

YOU MUST APPEAR IF YOU OPPOSE THIS COMPLAINT.

If you do not appear, a judgment will be entered against you by default. You may then be evicted.

If the complaint seeks a money judgment against you for rent due, and a judgment is entered against you, your wages, bank account, or other property may be attached.

If the complaint seeks possession of personal property and a judgment is entered against you, that property may be taken from you.

If you wish to have legal advice and you cannot afford to pay a lawyer, contact the Legal Aid Society (NA 8-1161), Neighborhood Legal Services (628-9161), or the D. C. Law Students in Court program (638-4798) for help, or come to Room 402, 613 G St., N.W. (Fourth Floor) for more information about where to obtain such help. *ACT PROMPTLY.*

IF YOU INTEND TO APPEAR WITHOUT A LAWYER, READ CAREFULLY THE INSTRUCTIONS ON THE REVERSE SIDE.

Costs of this suit to date are [Illegible].

_____ JOSEPH M. BURTON
Plaintiff's Attorney *Clerk of the Court*

_____
Address By RALPH W. JORDON
Deputy Clerk

_____
Phone Date Jul. 20, 1971

BRING THIS SUMMONS WITH YOU AT ALL TIMES

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

LANDLORD & TENANT BRANCH

IF YOU INTEND TO APPEAR WITHOUT A LAWYER:

If you have witnesses, books, receipts, or other evidence bearing on this claim, you should bring them to court with you.

If you wish to have witnesses summoned or need other assistance, see the clerk in Room 402, 613 G St., N.W. (Fourth Floor) at once.

If you admit that you owe the rent but desire additional time to pay, you must come to the hearing at the time and place indicated in the first paragraph of the Summons on the reverse side and make that request.

If you pay to the landlord all rent now due plus costs, and interest if demanded, the suit will be dismissed.

DATE	COURT CLERK'S MEMORANDUM
Aug. 9, 1971	Jury demand stricken, con't to 8-11-71 for trial. Judge Ryan. /s/ D.H.
Aug. 16, 1971	Trial held. Judgment for plaintiff for possession. Oral motion by defendant counsel for stay pending appeal denied as frivolous. Judge Ryan. /s/ D.H.
Aug. 26, 1971	Hearing held to determine amount of bond. Bond set at one thousand dollars ($1000.00). Judge Ryan. /s/ D.H.
Aug. 31, 1971	DF emergency motion to stay execution of writ of restitution to enable DF to obtain amount of bond, heard and denied. Judge Harris. /s/ r.p.

DATE	COURT CLERK'S MEMORANDUM
Sept. 3, 1971	DF further oral motion for emergency relief pending appeal (and contemplated dismissal of appeal) said request for relief being predicated principally on attempted tender of past due rent (of which $325 was represented solely by expressed intent of Social Services to make such payment in the future), heard and denied. [Counsel for DF present throughout; counsel for PL present in latter stages]. Judge Harris. /s/ r.p.
Sept. 28, 1971	Application for leave to proceed on appeal without prepayment of costs denied. Judge Ryan. /s/ D.H.
Nov. 11, 1971	Statement of Response pursuant to Rule 23(a) signed & filed here in compliance with D.C. Ct. of Appeals [Illegible]. Judge Ryan. /s/ D.H.

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

CIVIL DIVISION

LANDLORD AND TENANT BRANCH

L & T No. 68727-71

SOUTHALL REALTY
1935 11th St. N.W., Washington, D.C.
PLAINTIFF

vs.

DAVE PERNELL
2817 13th St. N.W., Washington, D.C.
DEFENDANT

ANSWER AND DEMAND FOR TRIAL BY JURY

Defendant for answer to the Complaint herein states that the plaintiff is not entitled to have judgment for the following reasons:

1. Defendant denies that a valid notice to quit has been served or that the right to such notice has been waived.
2. Plaintiff has maintained and continues to maintain the premises in question in an unsafe, unhealthy and unsanitary condition in violation of the Housing Regulations of the District of Columbia. The existence of such violations constitute a breach of plaintiff's obligations under the rental agreement and preclude plaintiff's recovery in this suit.
3. Defendant denies that any rent is owing to the plaintiff.
4. The Complaint fails to state a claim upon which relief can be granted.
5. That pursuant to an agreement between plaintiff and defendant, defendant was to make improvements on the property and plaintiff would waive its right to several months rent. Plaintiff has breached this agreement by the filing of the present suit.

WHEREFORE, defendant prays:

(a) That the complaint be dismissed, all costs to be paid by the plaintiff.

(b) That judgment be entered for defendant with all costs charged to the plaintiff.

(c) That the Court enjoin the plaintiff to comply with the Housing Regulations of the District of Columbia.

(d) That the Court grant such other and further relief as it deems necessary and proper.

(e) That the Court enter judgment for defendant on his setoff and counterclaim.

JURY DEMAND

Defendant hereby requests a trial by jury.

DISTRICT OF COLUMBIA, ss:

I, Dave Pernell, being first duly sworn on oath depose and say that I have read the allegations of the foregoing Answer and Demand for Trial by Jury and that they are true to the best of my knowledge, information and belief.

/s/ Dave Pernell
DAVE PERNELL

SUBSCRIBED AND SWORN TO before me this —— day of 1971.

/s/ [Illegible]
Notary Public, D. C.
My Commission expires: ————

SETOFF

Defendant claims a setoff in the amount of $389.60 for repairs made to bring the premises into partial compliance with the District of Columbia Housing Regulations.

COUNTERCLAIM

As a result of plaintiffs failure to maintain the premises in compliance with the District of Columbia Housing Regulations, defendant counterclaims for the amount of $75.00, said sum being the back rent paid to plaintiff.

NORMAN C. BARNETT, NLSP
Attorney for Defendant
3308 14th Street, N.W.
Washington, D.C.
462-4383

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Answer set off and counterclaim and Jury Demand on Southall Realty, 1935 11th Street, N.W., Washington, D.C., Plaintiff herein in person prepaid this 9th day of August, 1971.

/s/ Norman C. Barnett
NORMAN C. BARNETT

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 6022

DAVE PERNELL, APPELLANT,

v.

SOUTHALL REALTY, APPELLEE.

Appeal from the Superior Court of the District of Columbia

[Judgment entered this date]

(Argued May 1, 1972 Decided August 31, 1972)

Norman C. Barnett for appellant.

Herman Miller for appellee.

Before REILLY, Chief Judge, KERN, Associate Judge, and HOOD, Chief Judge, Retired.

REILLY, *Chief Judge:* This appeal by a tenant from a judgment rendered in favor of a landlord in a suit for possession of real property occupied by appellant under a written lease—a statutory proceeding authorized by D.C. Code 1967, § 16-1501—raises the issue of whether a party to such a suit is entitled to a jury trial. For more than a year, trial judges sitting in the Landlord and Tenant Branch of the Superior Court have taken conflicting positions on this matter, but this is the first time the question has been squarely presented to this court.

The case before us began on July 20, 1971 with the filing of a complaint asserting that the tenant was in default of payment for three months' rent in the amount of $375 and accordingly claiming judgment for possession. The complaint omitted any demand for rent in arrears. A summons incorporated in the complaint directed the tenant to appear in court and answer the landlord's suit on August 9, 1971. Such expedited notice in suits brought

under § 16-1501 is authorized by another section in the same chapter, § 16-1502, requiring that the summons be served or posted on the premises only seven business days before the date fixed for trial. On the designated date, the tenant filed an answer and demand for jury trial. The answer set forth a setoff in the amount of $389.60 for repairs made by the tenant, and a counterclaim for $75 predicated upon failure of the landlord to maintain the property in compliance with local housing regulations.

The court struck the jury demand and continued the case for trial to August 16, 1971. The tenant failed to appear in court that day, but the trial was held over the objection of his counsel, and judgment for possession entered for the landlord. According to the "Statement of Evidence and Proceedings" the only witness was the lessor. He identified a written lease, received as an exhibit, which required monthly rental payments of $150 and contained a clause under which the tenant agreed to make certain repairs for the sum of $300. He testified that no rental payments had been made since May. In the absence of the tenant, the latter's counsel attempted to prove the setoff, but the witness stated that he had inspected the premises and that none of the work agreed upon had been done by the tenant. Counsel was also unsuccessful in an effort to show any breach of housing regulations. The only evidence proffered was a document (or documents) purporting to be a report of a housing inspector but, as the papers were not authenticated or presented by a witness who could be cross-examined on the subject, the court rejected this material.

It is appellant's contention that the court below erred in denying his timely demand for jury trial, asserting that (1) the seventh amendment to the United States Constitution [1] guarantees the right of trial by jury in all

[1] U.S. CONST. amend. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

cases brought under § 16-1501, and (2) in any event, he was entitled to a jury trial in this case by virtue of the counterclaim and setoff specified in his answer.

This court has never addressed itself to the problem of the constitutional right to trial by jury in a suit for summary possession under § 16-1501, where back rent is not claimed nor title drawn into issue by the pleadings. For years the matter was academic, because until repealed by the District of Columbia Court Reform and Criminal Procedure Act of 1970,[2] the right to a jury trial "[w]hen the amount in controversy in a civil action . . . exceeds $20, and in all actions for the recovery of possession of real property," was expressly provided by another section of our code, § 13-702.[3] Congress did not make clear what it intended by the repeal of this section.[4] Undoubtedly the proponents of the new act deemed it unnecessary to include specific constitutional rights in a statute dealing with civil procedure, but irrespective of intent it is clear that, if the seventh amendment itself guarantees a right to demand a jury in a statutory proceeding for summary possession, the trial court erred in denying this right.

It is settled that the seventh amendment neither enlarged nor restricted the right to jury trial, but preserves such right as it existed in England in 1791, in "suits at common law." *Parsons* v. *Bedford*, 28 U.S. (3 Pet.) 433 (1830).[5] Our first inquiry then is whether this action or its equivalent existed at common law in England in 1791.

Appellant argues that an action under § 16-1501 is equivalent to ejectment, which was a common law action triable by jury, *Whitehead* v. *Shattuck*, 138 U.S. 146

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[2] Act of July 29, 1970, Pub.L. No. 91-358, 84 Stat. 473.

[3] Kass v. Baskin, 82 U.S.App.D.C. 385, 164 F.2d 513 (1947), held that such section was permissive rather than mandatory, conferring a right to jury trial upon demand, but not requiring such trial. At that time, the section was codified as D.C. Code 1940, § 11-715.

[4] *See* H.R. REP. No. 907, 91st Cong., 2d Sess. 164 (1970), and discussion in Hair v. Cooper, Super. Ct. D.C. (L&T No. 62963-71, decided August 23, 1971; reported in part in 99 D.W.L.R. 1569).

[5] *See also* Baltimore & C. Line v. Redman, 295 U.S. 654, 657 (1935).

(1891). The short answer to this argument, however, is that in a separate section in the same title of our code Congress has provided another remedial action for nonpayment of rent, officially captioned "Ejectment."[6] The accompanying annotation sets out a British statute of the year 1731 (Acts of 4 Geo. 2, c. 28, §§ 2-4), from which this particular section was derived. Under § 16-1124 there is a cause of action if (1) one-half year's rent is in arrears, and (2) there is a deficiency "of goods or chattels whereon to distrain for the satisfaction of the rent due." The section also provides for (1) an application for equitable relief from a judgment up to six months after execution thereon by tender of the back rent, and if granted, (2) a setoff of the sum the landlord gained or should have gained from the property during the time the tenant was out of possession against the rent accruing after judgment was rendered.

The archaic limitations upon the cause of action defined in § 16-1124 and the cumbersome procedure contemplated thereafter constitute such a marked contrast to the expedited character of the § 16-1501 proceedings devised by Congress to handle run-of-the-mill landlord-tenant controversies that any resemblance between suits for summary possession and common law ejectment actions is extremely superficial. We agree that the mere incorporation into a statute of a common law form of action does not deprive the parties to such action of any constitutional rights incidental thereto. Since § 16-1124 preserves the major characteristics of the old common law ejectment action, it may well be that this section falls within the scope of the seventh amendment.[7] It seems equally apparent that the kind of remedial action defined in §§ 16-1501, 1502, and 1503 was not known to the common law.

Another distinction is that an action under § 16-1501 normally does not try title. When the issue of title in-

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[6] D.C. Code 1967, § 16-1124.

[7] Neither the annotation to the official code nor the District of Columbia Code Encyclopedia lists appellate cases construing this section.

trudes into the action, it is discontinued and, pursuant to a rule of the Superior Court, transferred from the Landlord and Tenant Branch to the Civil Division "for trial on an expedited basis." [8] Appellant argues that the change of forum incident to a plea of title does not change the nature of the proceedings, and we would agree. Nevertheless, actions in which title is in issue constitute a special category under the statute.[9] That situation was not before the lower court in the instant case, and we do not deal with it on this appeal.

Appellant asserts, however, that the "purpose of ejectment at common law has always been primarily to determine the question of the right to possession, and secondarily the question of title, if that question be raised . . . ." *Shapiro* v. *Christopher*, 90 U.S.App.D.C. 114, 122, 195 F.2d 785, 793 (1952).[10] We agree on the limited ground that the purpose of determining title is to gain the right to use the property. But it is not only the result but the nature of the issue tried to which we must look in deciding whether the seventh amendment will apply to such actions. *Ross* v. *Bernhard*, 396 U.S. 531 (1970). Late 18th century English law may have, in our view, placed too great an emphasis upon "title," but if we are to accord proper effect to the seventh amendment, we must try to see the issues as they were perceived at that time.

Whether an issue of title was considered always present, if only conceptually, in actions in ejectment in England in 1791 is a question which cannot be answered with certainty.[11] It is clear, however, that some of the

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[8] Super. Ct. L&T Rule 5(c). Prior to the Court Reform and Criminal Procedure Act, D.C. Code 1967, § 16,1504 required transfer to the federal District Court where all issues, including title, were to be tried.

[9] No question of title is concluded between the parties in an action under § 16-1501, where title is not pleaded by the defendant. D.C. Code 1967, § 16-1505 (Supp. V, 1972).

[10] *Contra*, Brown v. Slater, 23 App.D.C. 51 (1904).

[11] *See* E. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966). A headnote to this article states that after careful study of all the available material, English and American, the author found "that the amendment was not intended to

most illustrious figures in our legal tradition were of that opinion. Thus Lord Mansfield in *Cottingham* v. *King*, 1 Burr, 621 (K.B. 1758), said that in the fictitious action of ejectment, the plaintiff may take only what he has shown title to. In *Atkyns* v. *Horde*, 1 Burr. 60, 119 (K.B. 1757), Lord Mansfield stated that "[a]n ejectment is a possessory remedy . . . [and] [e]very plaintiff in ejectment must shew a right of possession *as well as of property*." (Emphasis supplied.) And in *M'Arthur* v. *Porter*, 31 U.S. (6 Pet.) 205, 211 (1832), Mr. Justice Story observed "[t]hat the action of ejectment is a fictitious action, and is moulded by courts to subserve the purposes of justice in a manner peculiar to itself, is admitted, but its professed object is to try the titles of the parties . . . ."

Moreover, while the Supreme Court has recognized that at common law one with a right to possession could maintain an action for ejectment, it also has pointed out that statutory proceedings for summary repossession are plainly distinguishable from the common law action. In rejecting a constitutional challenge to an Oregon statute very similar to ours, the Court in *Lindsey* v. *Normet*, —— U.S. ——, 92 S.Ct. 862 (1972), held that a state may validly single out possessory disputes between landlord and tenant for especially prompt judicial settlement without violating equal protection. Discussing one historic difference between the statutory, remedy and ejectment, Mr. Justice White, in his majority opinion, observed (*id.* at 873):

> . . . the common law also permitted the landlord to "enter and expel the tenant by force, without being liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, providing he uses no more force than is necessary and do[es] no wanton damage." Smith v. Reeder, 21 Ore. 541, 546, 28 P. 890, 891

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codify a rigid form of jury practice—that indeed there was no consistent practice in 1790 to be codified." At the time of publication, the author was Curator of the Treasure Room, Harvard Law Library.

> (1892). The landlord-tenant relationship was one of the few areas where the right to self-help was recognized by the common law of most States, and the implementation of this right has been fraught with "violence and quarrels and bloodshed." Entelman v. Hagood, 95 Ga. 390, 392, 22 S. E. 545 (1895). An alternative legal remedy to prevent such breaches of the peace has appeared to be an overriding necessity to many legislators and judges. (Footnote omitted.)

While *Normet* did not deal with the jury issue, state courts, also distinguishing between writs of ejectment and summary statutory proceedings, have held that litigants in such proceedings are not entitled to jury trials, notwithstanding provisions in their respective state constitutions incorporating the seventh amendment.[12] *Reece* v. *Montano*, 48 N.M. 1, 144 P.2d 461 (1943); *Wilder* v. *Kneeland*, 94 N.H. 185, 49 A.2d 506 (1946); *Frazee* v. *Bratton*, 26 S.C. 348, 2 S.E. 125 (1887). Where formal landlord-tenant relationship is not shown, the doctrine that ejectment (presumably with a right to jury trial) rather than a summary proceeding is the proper remedy was recognized by state courts at an early period. *See, e.g.*, *Cassidy* v. *Clark*, 62 Ga. 412 (1879); *Whitney* v. *Dart*, 117 Mass. 153 (1875).

Appellant also urges that any distinction between summary possession as defined in our code and ejectment is meaningless as both actions historically were triable by jury. By adopting Judge Braman's scholarly opinion in *Urciolo* v. *Evans*,[13] appellant contends that the progenitors of § 16-1501 are the writ of assize and the writ of entry. The histories of these writs may be traced in England to the early Plantagenet period, thus long antedating the common law action of ejectment to which reference has been made—a development of the later 17th century.[14]

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[12] In some states these statutory suits for repossession of real estate are called actions of eviction, actions of forcible entry, or actions of unlawful detainer.

[13] Super. Ct. D.C. (L&T No. 60195-71, decided Sept. 14, 1971; reported in part in 99 D.W.L.R. 1729).

[14] 4 J. MINOR, INSTITUTES OF COMMON AND STATUTE LAW 439 (8 ed. rev. 1893).

In view of the lengthy account in the *Urciolo* opinion of the evolution of these writs into a proceeding closely resembling the summary remedial landlord-tenant action involved here, it is unnecessary to summarize the historic materials which led Judge Braman to the conclusion that cognate actions flourished in the colony of Maryland in the 18th century, and that a Maryland statute enacted in 1793 before the District of Columbia was created bears the imprint of the writ of assize.[15] This statute in turn was incorporated into the law of this jurisdiction by reason of the Organic Act of February 27, 1801, which made all laws then in force in Maryland applicable to the District of Columbia. For 63 years the Maryland adaptation of the writ of assize was the operative remedy here for landlords suing for summary repossession, except that the justices of the peace before whom the jurors and litigants were summoned to appear were District rather than county officials. In 1864 Congress enacted for the District of Columbia a new landlord-tenant repossession statute[16] (Act of July 4, 1864, ch. 243, 13

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[15] Act of Maryland of 1793, ch. 43, 2 W. Kilty, *Laws of Maryland* (1800). Entitled "An Act to Provide a Summary Mode of Recovering the Possession of Lands and Tenemants Holden by Tenants for Years, or at Will, after the Expiration of their Terms", it provided that where the tenant, "after expiration of the term" and notice to quit, refused to remove, then

> . . . upon complaint thereof made by the said lessor . . . to any two justices of the peace of the county wherein the lands . . . are situate, and upon due proof made before them, the said justices . . . are hereby authorized and required forthwith to issue their warrant, upon their hands and seals, to the sheriff of the said county directed, commanding him to summon twelve good and lawful men of his said county, to be and appear on the premises before the said justices, on a day in the said warrant mentioned, which shall be the fourth day after issuing the said warrant; and also at the same time to issue their summons to the tenant . . . in possession, to be served by the said sheriff, that he . . . appear on the day and at the same place in the said warrant mentioned, to show cause, if any he . . . have, why restitution of the possession of said lands . . . should not be forthwith made to such lessor. . . .

[16] In Willis v. Eastern Trust & Banking Co., 169 U.S. 295 (1898), it was held that a mortgagee who had begun an action before a jus-

Stat. 383; subsequently codified as §§ 680-91, Rev. Stat. D.C.), which provided—*inter alia*—the losing party at the justice of the peace level with a right of trial *de novo* by jury in the Supreme Court of the District of Columbia.[17] As a result of subsequent revisions and various court reorganization acts, this 1864 act eventually became the summary proceeding now embodied in § 16-1501.

Accordingly, appellant submits that this court should agree with Judge Braman's conclusion that § 13-702, now repealed, was not intended to confer a right which did not previously exist under the seventh amendment, for "an unbroken history of 170 years" in the District of Columbia, "linked to its counterparts of assize and entry" discloses that trial by jury was always the procedure in repossession cases. While we have no reason to take exception to the historical sketch in the *Urciolo* opinion of how summary repossession actions evolved, the thesis that the jury functions known to the writ of assize and eventually to the justice of the peace courts were the kind of jury trials the seventh amendment intended to preserve has one fatal flaw. This very proposition has been rejected by the Supreme Court of the United States, *Capital Traction Co.* v. *Hof*, 174 U.S. 1 (1898).

In that case, the Court decided that a statute permitting a litigant in a civil action for damages to claim a jury before a justice of the peace with a right of appeal to the District Supreme Court authorizing a jury trial *de novo* was not in conflict with the requirement of the seventh amendment that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." The Court did so on the ground that a trial by jury before a justice of the peace being

> . . . unknown in England or America before the Declaration of Independence, can hardly have been

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tice of the peace was not entitled to maintain process under this statute, his appropriate remedy being ejectment or foreclosure.

[17] Then the trial court of general jurisdiction of the District, with authority to hear cases arising under local as well as federal law.

> within the contemplation of Congress in proposing, or of the people in ratifying, the Seventh Amendment to the Constitution of the United States.[18]

In writing for the majority, Mr. Justice Gray also observed:

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitution, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. . . .[19]

In our view, *Hof* shatters the picture of a continuous history of jury trials protected by the seventh amendment in summary landlord-tenant possession cases since the founding of the District. The Supreme Court's decision in that case makes it clear that until the passage of the 1864 act no right to a jury trial within the contemplation of the Constitution was available to the parties to such actions. Thus, the successor statute to the 1864 act—the section of the code[20] repealed by the Court Reform Act of 1970—cannot be deemed as declarative of seventh amendment rights and therefore mere surplusage on the statute books.

Hof is not the only Supreme Court decision indicating that the right to jury trial in summary possession pro-

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[18] Capital Traction Co. v. Hof, 174 U.S. 1 at 18.

[19] *Id.* at 13, 14.

[20] D.C. Code 1967, § 13-1702, referred to earlier in this opinion.

ceedings depends wholly on statute. In *Block* v. *Hirsh*, 256 U.S. 135 (1921), a challenge to the constitutionality of a statute transferring from the trial court to a rent control commission a landlord's right to recover possession, was based on the ground, *inter alia*, that it deprived landlords and tenants of a trial by jury. Mr. Justice Holmes had little difficulty in his majority opinion in disposing of this objection with the observation that

> . . . [i]f the power of the commission established by the statute to regulate the [landlord-tenant] relation is established . . . this objection amounts to little. To regulate the relationship and [the procedure] to decide the facts affecting it are hardly separable. . . . 256 U.S. 135 at 158.

Obviously the Court could scarcely have made this observation if the right to jury trial was conferred by the Constitution. Therefore we hold that the repeal of § 13-702, *supra*, deprives the parties in landlord-tenant cases of a right to demand jury trial, if the cause of action is predicated on non-payment of rent or some other breach of the lease, and the only remedy sought is repossession of the rented premises.[21]

There remains for consideration the contention that irrespective of the right of jury trial in suits for possession, a jury trial was required in this case by reason of the counterclaim and setoff affirmatively pleaded in appellant's answer. Appellant relies on *Dairy Queen* v. *Wood*, 369 U.S. 469 (1962), and *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959), which hold that even though the cause of action is equitable in character, defendant is entitled to a jury trial on issues raised by allegations in a complaint or by a counterclaim sounding in law. In our view, appellant's reliance on these decisions is misplaced as the claims enunciated in the answer, upon analysis, do not present issues traditionally associated with common law actions.

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[21] We are not impressed with the alternative argument that except in rare cases, the right of occupancy of a house or apartment is worth more than $20. This could be said of the rights sought to be adjudicated in the vast majority of suits in equity.

In his answer to appellee's complaint, appellant claims $75 back rent paid, based on appellee's failure to maintain the premises in compliance with the District of Columbia Housing Regulations, and $389.60 for repairs made to bring the premises into partial compliance with the housing regulations. Notwithstanding appellant's characterization of the first of these claims as a "counterclaim" and the second as a "setoff," we regard the first as "recoupment" and the second as a "setoff," insofar as they do not exceed the amount of back rent unpaid in contradistinction to a "counterclaim for a money judgment" within the meaning of Rule 5(b) of the Landlord and Tenant Branch of the Superior Court, which provides:

> . . . In actions in this branch for recovery of possession of property in which the basis of recovery is nonpayment of rent or in which there is joined a claim for recovery of rent in arrears, the defendant may assert an equitable defense of recoupment or setoff or a counterclaim for a money judgment based on the payment of rent or on expenditures claimed as credits against rent or for equitable relief related to the premises. No other counterclaims, whether based on personal injury or otherwise, may be filed in this branch. This exclusion shall be without prejudice to the prosecution of such claims in other branches of the court.

The original complaint alleged that $375 rent was in default, but another month's rent of $150 had accrued by the time of trial—a total of $525. We view appellant's claims, therefore, as defenses of recoupment and setoff—defenses, it will be noted, that the rule styles as "equitable."

According to appellant, however, despite the descriptive term "equitable" used in the quoted rule, the opinions in *Brown* v. *Southall Realty Company*, D.C.App., 237 A.2d 834 (1968), and *Javins* v. *First National Realty Corporation*, 138 U.S.App.D.C. 369, 373, 428 F.2d 1071, 1075 (1970), demonstrate that inasmuch as his counterclaim rests on an asserted violation of local housing regu-

lations, it raises an issue of breach of warranty which could only be determined in a court of law. In the *Brown* case, all that this court held was that where it was illegal to rent a house until certain conditions were corrected, an attempt to enforce a lease executed in violation of such administrative order must fail.[22]

It appears that appellant's principal reliance is not upon the *Brown* holding, but upon the statement of the circuit court in *Javins*, *supra*, to the effect that "leases of urban dwelling units [are to] be interpreted and construed like any other contract."[23] From this premise the court reasoned that the landlord had an implied obligation to maintain the premises in accordance with the housing regulations, and his failure to do so entitled the tenant to a setoff or counterclaim in a suit for possession. The real questions, however, is whether the defense thus accorded by *Javins* should be construed as a legal issue within the doctrine of *Ross*, *supra*, and therefore triable by jury under the seventh amendment. In our opinion, it should not.

In the first place, it could not be more obvious that a defense to a suit for possession based on an implied warranty of habitability measured by the housing regulations was not an issue tried in any suit at common law in England in 1791. Such a defense was not available in any suit for possession, regardless of the form it took, in Eng-

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[22] Brown v. Southall Realty Co., D.C.App., 237 A.2d 834 (1968), does not stand for the proposition that in an action where possession is the only remedy sought, a later breach of the housing regulations is a valid defense. In that case the tenant having moved from the premises, the issue of occupancy was moot but the appeal was entertained because the judgment finding the amount of rent in arrears would have been res judicata had the landlord then brought an action for the unpaid rent under the doctrine of Bess v. David, D.C.Mun.App., 140 A.2d (1958). Whether or not such judgments now have this legal effect is an open question as a result of limitations upon the doctrine in Atkins v. United States, D.C.App., 283 A.2d 204 (1971), and the absence of any holding by this court acquiescing in or disagreeing with Tutt v. Doby, —— U.S.App.D.C. ——, 459 F.2d 1195 (1972), *rev'g* 265 A.2d 304 (1970).

[23] Javins v. First Nat'l Realty Corp., 138 U.S.App.D.C. 369 at 373, 428 F.2d 1071 at 1075 (1970).

land in 1791. It is a creation of 20th century American courts,[24] and is clearly a departure from the common law.[25]

Second, it is also plain that in suggesting that a modern lease be interpreted like a contract the circuit court was not intending any seventh amendment consequences. The opinion recognizes that the contract approach does not deny the possible importance of the fact that land is involved in a transaction, and suggests that the approach of the civil law—a system of law which rarely uses a jury and which has always viewed a lease as a contract —is superior to that of the common law.[26] In fact, the author of the opinion goes so far as to declare that the modern apartment tenant more closely resembles a guest in an inn—for whose eviction the intervention of a jury has never been required—than the typically agrarian tenant to whom the common law applied.[27]

It should also be observed that whatever right appellant has to plead defenses to a suit seeking only repossession as counterclaims or setoffs predicated on the failure of the landlord to maintain the premises in accordance with housing regulations, rests entirely upon a current rule of the Superior Court and not upon the Constitution.[28] Prior to *Javins*, this rule permitted such defenses only in suits in which the demand for repossession was coupled with a claim for back rent. In its recent *Normet* decision, *supra*, the majority of the Court (Mr. Justice Douglas dissenting) held constitutional a statute restricting the issues in purely possessory actions as to whether the tenant has paid rent and honored the covenants of the lease, thereby barring the tenant from rais-

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[24] *See* Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969); *see also*, Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

[25] Javins v. First Nat'l Realty Corp., 138 U.S.App.D.C. 369 at 375-77, 428 F.2d 1071 at 1077-79.

[26] *Id.* at 373 n.13, 428 F.2d at 1075 n.13.

[27] *Id.* at 375 n.33, 428 F.2d at 1077 n.33.

[28] Super. Ct. L&T Rule 5(b).

ing such claims as failure to repair in such actions. The Court said that as long as the tenant was not foreclosed from instituting an action of his own to obtain damages or other relief, the statute was valid. The Court observed: [29]

> Underlying appellants' claim is the assumption that they are denied due process of law unless Oregon recognizes the failure of the landlord to maintain the premises as an operative defense to the possessory FED action and as an adequate excuse for nonpayment of rent. The Constitution has not federalized the substantive law of landlord-tenant relations, however, and we see nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants. Likewise, the Constitution does not authorize us to require that the term of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated. . . . (92 S.Ct. 862 at 871)

In light of this opinion, we find no constitutional infirmity in the trial court's ruling in a companion case [30] (and applied here) that Rule 5(b) merely accords an option upon a tenant, and that if he wishes to litigate any counterclaim for damages against a landlord before a jury, he should institute his own action.[31]

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[29] The majority opinion regarded this question as having been settled by two prior cases holding it ". . . permissible to segregate an action for possession of property from other actions arising out of the same factual situation which may assert valid legal or equitable defenses or counterclaims." Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915); Bianchi v. Morales, 262 U.S. 170 (1923).

[30] Silvey v. Snyder, Super. Ct. D.C. (L&T No. 61505-71, decided August 23, 1971; reported in part in 99 D.W.L.R. 1569).

[31] Appellant also assigns as error the trial court's refusal to stay the writ of restitution because of some undertaking by the Department of Human Resources, contending that this amounted to an adequate tender of payment, Trans-Lux Radio City Corp. v. Service Parking Corp., D.C.Mun.App., 54 A.2d 144 (1947). There is nothing in the record to show the terms of such undertaking, however, except a promise to make such payment in the future. Under such circumstances, we cannot hold that the Trans-Lux rule was satisfied.

While we agree with the observation in the *Urciolo* opinion that a seventh amendment question "cannot be resolved on the basis of caseloads, statistics, or expedients," judges should nevertheless be cautious in attributing to the fathers of the Constitution an intention to impose upon Congress and the courts a rigid system which would nullify efforts to expedite judicial disposition of landlord-tenant controversies.

It is unlikely that a construction of the *Javins* defense making a jury trial demandable whenever the defense is raised, will improve the system of justice in this jurisdiction. Local building, housing, and safety regulations are complex, and issues of fact thereunder are not particularly suited to jury determination. *See Williams* v. *Auerbach*, D.C.App., 285 A.2d 701, 703-704 (1972). Of broader significance is the effect of jury trials on already congested courts which has led a number of commentators to suggest the abolition of the jury system entirely where not constitutionally required.[32]

Noting the possible impact of the *Javins* opinion upon the already staggering volume of landlord-tenant litigation in the Superior Court, the Chief Judge of that tribunal has raised the question of whether the establishment of a special administrative agency is not necessary if such controversies are to be decided promptly.[33] It would be ironic if an overbroad interpretation of the seventh amendment should force us to abandon a system of law derived, although now somewhat distantly, from the common law in favor of an administrative agency which escapes the stricture of the amendment because "[t]he proceeding is one unknown to the common law." *National Labor Relations Board* v. *Jones & Laughlin*

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[32] *See, e.g.*, J. Frank, *Courts on Trial* (1949); E. Henderson, *supra* n.11; *"Abolition of the Civil Jury: Proposed Alternatives,"* 15 DEPAUL L. REV. 416 (1966); D. Karlen, *"Can a State Abolish the Civil Jury?"*, 1965 WISC. L. REV. 103; L. Sarpy, *"Civil Juries, Their Decline and Eventual Fall"*, 11 LOYOLA L. REV. 243 (1962).

[33] *See* H. Greene, *"A Proposal for the Establishment of a District of Columbia Landlord-Tenant Agency"*, 38 D.C. BAR J., Nos. 1-6 at 25 (1971).

Steel Corporation, 301 U.S. 1, 48 (1937). *See also Block* v. *Hirsch*, 256 U.S. 135 (1921).

We conclude that in a suit for possession, a defense based on the housing regulations raises no issue as to which the seventh amendment preserves the right to a trial by jury.

Affirmed.

DISTRICT OF COLUMBIA COURT OF APPEALS

JANUARY TERM, 1972

No. 6022

L&T 68727-71

DAVE PERNELL, APPELLANT

v.

SOUTHALL REALTY, APPELLEE

Appeal from the Superior Court of the District of Columbia, Civil Division.

BEFORE: Reilly, Chief Judge, and Kern, Associate Judge, and Hood, Chief Judge, Retired.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Superior Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Superior Court of the District of Columbia, in this cause, be and the same is hereby, affirmed.

Per Curiam.
For the Court:

/s/ Charles J. Rumsey
CHARLES J. RUMSEY
Chief Deputy Clerk

Dated: Aug. 31, 1972.

Opinion per Chief Judge Gerard D. Reilly.

SUPREME COURT OF THE UNITED STATES

No. 72-6041

DAVE PERNELL, PETITIONER

v.

SOUTHALL REALTY

On petition for writ of Certiorari to the District of Columbia Court of Appeals.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 2, 1973

★ U. S. GOVERNMENT PRINTING OFFICE: 1973 517163 41

No. 72-6041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

DAVE PERNELL,

Petitioner,

v.

SOUTHALL REALTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR PETITIONER DAVE PERNELL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and Statutes:

IN THE

SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reported at 294 A.2d 490 (A. 14).[1]

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[1] Citations to "A.___" are to the appendix filed in this Court and citations to "R.___" are to the record transmitted to this Court by the court below.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on August 31, 1972 (A. 31). On November 16, 1972, Chief Justice Burger granted an extension of time for the filing of the petition for certiorari to and including January 13, 1973; the petition was filed within that period; and it was granted on April 2, 1973. Jurisdiction of this Court to review the decision below is conferred by 28 U.S.C. §1253(3) (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States and D.C. Code §16-1501 to 1505 (1967 and Supp. V, 1972) are set forth in Appendix A to this brief at pp. 1a-2a, below.

QUESTIONS PRESENTED

1. Whether the Seventh Amendment guarantees a trial by jury in a proceeding brought by a landlord against his tenant to determine the right to possession of real property, pursuant to D.C. Code §§16-1501 to 1505 (1967 and Supp. V, 1972).

2. Whether the Seventh Amendment guarantees a trial by jury on money claims for back rent paid and repairs made by the tenant where those claims are asserted in the same statutory eviction proceeding.

STATEMENT OF THE CASE

A. The History and Nature of the District of Columbia Statutory Eviction Proceeding

1. Virtually since the establishment of the District of Columbia as the Nation's Capital in 1800, there has been

a statutory eviction proceeding in which landlords could obtain a swift determination of the right to possession and could secure the eviction of tenants who, for nonpayment of rent or other reasons, were no longer entitled to possession. Under successive statutory revisions continuing into this decade, either party to the eviction proceeding was entitled on timely demand to a trial by jury. Consequently, in the District of Columbia the link between the statutory eviction proceeding and trial by jury is over a century and a half old.

In the Organic Act of 1801, Congress adopted for the District the common law and statutes then in force in Maryland. 2 Stat. 104. Included among the Maryland statutes thus adopted was one providing "a summary mode of recovering the possession of lands and tenements" commencing with a complaint by the landlord and subject to a trial by jury.[2] The statute directed the landlord to file his complaint with the justices of the peace and it contemplated that the justices would command the sheriff to "summon twelve good and lawful men of his said county" together with the tenant in possession. If, upon hearing or on default it appeared to "said jury" that the landlord was entitled to possession, then the justices were to "award restitution of the possession of the said lands" to the landlord and order the sheriff to restore the landlord to possession.

This proceeding continued in the District during the first half of the nineteenth century (*e.g.*, *Lenox v. Arguelles*, 4 D.C. 477, Fed. Cas. No. 8244 (C.C. D.C. 1834)) until a general revision of landlord and tenant law

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[2] Act of Maryland, 1793, ch. XLIII, reprinted in II W. Kilty, *Laws of Maryland* (1800). That statute is reproduced in Appendix B to this brief at p. 1b, below.

was enacted in 1864. 13 Stat. 383. Section 2 of the 1864 Act provided in part that "when possession is held without right" after the lease has been terminated a complaint could be filed by the landlord with the justice of the peace, and if upon trial it appeared that "the complainant is entitled to the possession of the premises he shall have judgment and execution for the possession and costs." 13 Stat. 383-84.[3] The 1864 Act departed from the Maryland statute by providing that the remedy could be used not only in landlord and tenant proceedings but also in any case where a possessor had been forcibly evicted or where a possessor was wrongfully holding the premises by force.

The 1864 Act, in Sections 4-5, provided that either party could appeal to the Supreme Court of the District and it contemplated that in such an appeal either party would be entitled to trial *de novo* by jury. 13 Stat. 384. Indeed, the latter section provided that on trial of the suit in the Supreme Court "if the jury find for complainant, they shall assess the damages and intervening rent." 13 Stat. 384. Accordingly, the tenant could be tried before the justice of the peace alone and yet preserve his right to a jury trial in the District's Supreme Court. *E.g.*, *Luchs v. Jones*, 8 D.C. (1 MacArthur) 345 (D.C. Supreme Ct. 1874). He could not, however, have a jury trial in both forums.[4]

[3]Section 3 of the 1864 Act provided that if the tenant pleaded title to the premises in himself or in a third person under whom he claimed, then on posting of an appropriate bond the proceeding was to be "certified" to the Supreme Court of the District of Columbia. 13 Stat. 384. This accorded with the procedure under the 1793 Maryland statute in which a claim of title by the tenant required resolution in the "next county court." See p. 1b, below.

[4]It is not clear whether landlord and tenant actions were tried by jury in the justice of the peace court after 1864, but debt claims were so tried; and the rule against double jury trials, once before the justice of the peace and once in the Supreme Court, was well established in cases of the latter kind. *E.g.*, *Fitzgerald v. Leisman*, 10 D.C. (3 MacArthur) 6 (D.C. Supreme Ct. 1877).

Through successive revisions, the landlord and tenant proceeding remained basically unchanged during the next half-century. See, *e.g.*, Revised Statutes (relating to the District of Columbia) of 1873-74, §§684-91 (1875); D.C. Code §§20-24 (1901). 31 Stat. 1193.[5] Then, in 1921 the justice of the peace court—which in the interval had been renamed the Municipal Court (35 Stat. 623)—was made a court of record with power to provide jury trials in the full constitutional sense required by this Court's decision in *Capital Traction Co. v. Hof, supra*. 41 Stat. 1310. H.R. Rep. No. 472, 66 Cong., 1st Sess. (1919).[6] Consonantly, *de novo* trial in the Supreme Court of the District was abolished. 41 Stat. 1312.

This was the last major change, so far as landlord and tenant proceedings were concerned, until 1970. In the meantime, the coverage of the statutory eviction proceeding—which had been extended to forcible entries

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[5]The 1901 Code abolished jury trials in the justice of the peace court (§7 (31 Stat. 1191)) in response to this Court's decision in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), that the Seventh Amendment required a jury sitting with a judge rather than a justice of the peace. See pp. 37-39, below. It continued to provide for jury trial *de novo* on appeal in the District's Supreme Court. D.C. Code §§30, 80 (1901), 31 Stat. 1194, 1201.

[6]Section 3 of the statute provided: "That hereafter when the value in controversy in any action pending in said Municipal Court shall exceed $20, and in all actions for the recovery of possession of real property, either party may demand a trial by jury. The trial judge shall conduct such jury trial and according to the practice and procedure now obtaining, or as hereafter modified, in the Supreme Court of the District of Columbia, and shall have the same power to instruct juries, set aside verdicts, arrest judgments and grant new trials as said Supreme Court." 41 Stat. 1310-11. The language in the first sentence was evidently designed to embrace all actions where the Seventh Amendment might require a jury trial. The language in the second portion of the second sentence was taken almost verbatim from *Hof*. See 174 U.S. at 39.

and detainers in 1864 and thereafter to possessory disputes arising out of mortgages (D.C. Code § 20 (1901), 31 Stat. 1193)—was ultimately expanded in 1953 to all parties claiming a right to possession of real property against a wrongful occupant. 67 Stat. 66.[7] The name of the trial court was also changed from Municipal Court to Court of General Sessions. 73 Stat. 77.

2. In 1970, Congress enacted the District of Columbia Court Reform and Criminal Procedure Act, which became effective on February 1, 1971. 84 Stat. 473. The new Act retained the eviction proceeding essentially intact except that jurisdiction was transferred from the old Court of General Sessions to the superseding Superior Court of the District of Columbia. In this revision, however, Congress omitted the statutory provision which since 1921 had expressly provided for trial by jury in specified civil actions including "all actions for the recovery of possession of real property." See p. 5, n. 6, above. It did so, as the legislative history reveals, because Congress deemed the statutory guarantee "superfluous in light of constitutional jury trial requirements . . . ." H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 164 (1970).

As the statutory eviction proceeding exists today, it provides the usual mode of trying the right to possession of real property. As original trial jurisdiction has been consolidated in the Superior Court, there is no longer any provision for certifying the case to a different court when a question of title arises in such a proceeding. The court

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[7] Although this expansion eliminated references to particular categories of claimants and parties in possession, including the specific reference to those who forcibly entered or forcibly detained property without right, the statute continued to be captioned in successive codes as relating to "forcible entry and detainer."

by rule has established a landlord and tenant branch which, in the first instance, considers all complaints filed pursuant to the statutory eviction statute.[8]

Procedurally, the statute provides that the tenant must be given at least seven days notice before trial, although the period may often be longer. D.C. Code 16-1501 (Supp. V, 1972). The landlord may claim not only possession of the premises but also seek a judgment for personal property located on them and a money judgment for rent in arrears. Landlord and Tenant Rule 3. However, the money judgment can be obtained only if there has been personal service upon the tenant or if the tenant asserts a counterclaim or a defense of recoupment or set off. *Id.* Conversely, where eviction is sought for nonpayment of rent, the tenant may assert in the eviction proceeding defenses of recoupment or set off or he may counterclaim "for a money judgment based on the payment of rent or on expenditures claimed as credits against rent . . . ." Landlord and Tenant Rule 5(b).

Landlord and Tenant Rule 6 provides that "any party entitled to a jury trial may demand a trial by jury of any action brought in this branch" by timely notice and payment of jury fee, and it provides that any jury case will be tried on an expedited basis.[9] During the period prior to 1971, statutory eviction cases were regularly

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[8] In a replica of the old statutory scheme, the Superior Court's Landlord and Tenant Rule 5(c) provides that the case is to be certified to the Civil Division for trial on an expedited basis if a question of title is raised.

[9] The general civil rules of the Superior Court also provide: "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by an applicable statute shall be preserved to the parties inviolate." Superior Court Civil Rule 38(a). This provision applies to landlord and tenant proceedings by virtue of Landlord and Tenant Rule 2.

tried to juries. *E.g., Kass v. Baskin*, 82 U.S. App. D.C. 385, 164 F.2d 513 (D.C. Cir. 1947). The adoption of Landlord and Tenant Rule 6, effective February 1, 1971, indicates that it was expected that the same procedure would be followed in eviction proceedings in the new Superior Court.

B. The Proceedings and Decision Below in This Case

1. In May 1971, the petitioner, Dave Pernell, entered into a lease agreement with the respondent, Southall Realty, for the rental of a house in the District of Columbia (R. 53). Pernell, his wife and children moved into the house in the first week of May. Pernell paid Southall $75 towards the first month's rent of $150 per month, and the lease agreement provided that Southall would pay Pernell $300 on condition that Pernell removed certain trash from the premises and made certain specific repairs (R. 53).

On July 20, 1971, Southall filed a complaint in the Superior Court, pursuant to D.C. Code §§16-1501 to 1505 (1967 and Supp. V, 1972), to oust Pernell from possession of the premises (A. 6). The basis for Southall's complaint was Pernell's alleged nonpayment of rent in the amount of $375 (A. 6). Pernell's copy of the complaint showed a demand for back rent allegedly due and for furniture on the premises (R. 55), but these requests were deleted in the copy filed in the court (A. 7). Pernell was required to answer the complaint by August 9, 1971 (A. 7).

On that day, Pernell filed a verified answer (A. 11), money claims of set off and counterclaim (A. 13), and a demand for a jury trial (A. 11). The defenses asserted by the answer were that a valid notice to quit had not been

served nor the right to notice waived; that Southall maintained the premises in an unsafe, unhealthy and unsanitary condition in violation of the District housing regulations and Southall's obligations under the lease agreement; that Southall had breached its agreement to credit improvements made by Pernell against his rent; and that no rent was owing (A. 11). Under District law, as in a number of other jurisdictions, a tenant may defend against eviction proceedings for nonpayment on grounds that the housing regulations have not been complied with and the premises are not being maintained in habitable condition by the landlord. *Javins v. First National Realty Corp.*, 138 U.S. App. D.C. 369, 428 F.2d 1071, *cert. denied*, 400 U.S. 925 (1970); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. Ct. App. 1968).[10]

The set off in the amount of $389.60 represented repairs Pernell asserted that he had made to bring the premises into partial compliance with housing regulations (A. 13). The counterclaim in the amount of $75 was for the recovery of back rent paid while Southall had

[10] In *Javins*, the court held that under the common law in the District and its housing regulations, a lease is to be construed as a contract and, so construed, contains an implied warranty of habitability of the premises measured by the District's housing regulations. Thus "the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty. . . . At trial, the finder of fact must make two findings: (1) whether the alleged violations existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach." 138 U.S. App. D.C. at 380-81, 428 F.2d at 1082-83. See also D.C. Housing Regs., §§2902.1(a) and (b), promulgated in Commissioner's Order No. 70-220, June 12, 1970.

maintained the premises in violation of the housing regulations (A. 13). Since Southall's claim for eviction was based upon nonpayment of rent, Pernell was entitled to assert these claims for money judgments in the course of the eviction proceeding. See p. 7, above.

Complying with local rules governing a jury trial, Pernell not only demanded a jury trial in his answer but paid the necessary fees and verified his answer (A. 12); R. 172). On the same day that Pernell filed his answer and appeared with counsel, the trial judge without motion by Southall struck the jury demand *sua sponte* and continued the case for a week (A. 1). The basis for the trial judge's initial action is not entirely clear, but the only support for it is the contention that no constitutional right to jury trial exists in the eviction proceeding.[11]

When counsel for Pernell appeared on the continued date, expecting under the usual motion practice to argue the question whether Pernell was entitled to a jury trial (Landlord and Tenant Rule 13(c)), the trial judge declared that trial to the court would proceed immediately (R. 61). The trial judge refused Pernell's counsel a continuance until the afternoon of the same day or until the next day in order to contact Pernell so that he could be present to testify at the trial (R. 61).

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[11] During the course of the appeal, the trial judge stated that the jury demand had been struck both because the required fee had not been paid and because there was no right to trial by jury (R. 42, 60). The court below, while retaining jurisdiction, remanded the case to the trial court to resolve squarely the question whether the appropriate fee had been paid (R. 162). A hearing was held before the trial judge in which documentary evidence was presented showing that the fee had been paid (R. 168), and the trial judge then certified to the court below that the fee had been paid (R. 172).

The trial judge also rejected counsel's attempted argument that Pernell was constitutionally entitled to a trial by jury under the Seventh Amendment.

At the ensuing trial Southall's agent authenticated the lease agreement (R. 61). He also testified that no rent had been paid since May 1971 and that Pernell had not completed the agreed repairs (R. 61). On cross-examination, counsel for Pernell sought to offer in evidence an official housing code deficiency list for the premises in question issued by the District, listing numerous violations of the housing code (R. 18-21, 62); and he also offered receipts showing expenditures for repairs made by Pernell (R. 17, 62). The court declined to admit any of these documents into evidence on the ground that they were not authenticated or presented by a witness who could be cross-examined (R. 62).[12] Judg-

[12] These documents establish the substance of Pernell's defense to the suit for possession as well as the basis for his set off and counterclaim. Had Pernell been given the opportunity to testify at trial, his testimony would have been substantially the same as his affidavit filed with the court below on appeal in connection with his request for reduced bond pending appeal (R. 14). The affidavit stated in pertinent part:

"[W]hen I first negotiated to lease the subject premises Mr. Southall of Southall Realty informed me that the house had been vacant for over two years and . . . needed substantial repairs. When I first went to the house I found that all the radiators except three were broken . . . . The hot water tank was broken, the roof was leaking seriously, [and] the toilets on both the first and second [floors] were stopped up. . . . The back porch was rotted and in need of major repair. The entire yard as well as the house was full of trash. Mr. Southall told me that I could move in and set off the costs of such repairs against the rent. In addition Mr. Southall agreed in our lease to pay me the sum of $300 for repairing the roof, the back porch and steps . . . and for removing the trash from the premises. In reliance on Mr. Southall's agreement I have spent substantial time and money to repair the house. I have

ment was entered for Southall and Pernell's request for a stay pending appeal was denied (R. 140).

2. On appeal to the Court of Appeals for the District of Columbia, Pernell sought a stay from that court pending disposition of the appeal (R. 1). The court granted a short stay and remanded the matter to the trial judge to fix bond (R. 7). Pernell sought as a reasonable bond one covering the amount of past rent claimed and normal monthly rentals as they became due (R. 9), but the trial judge set bond at $1000 which Pernell was unable to meet (R. 140).[13] On September 3, 1971, Pernell and his family were evicted pursuant to the trial court's judgment.

Thereafter, the constitutional issues sought to be raised in this Court were argued to the court below.[14] On August 31, 1972, the court below filed an opinion holding that under the Seventh Amendment Pernell was not entitled to a jury trial either in defending his right to

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repaired . . . the front porch, the roof and . . . several windows. I also removed three truckloads of trash from the premises. . . . I have spent $389.60 for the purchase of a hot water tank and replacement radiators . . . . Mr. Southall has made no repairs whatsoever to the property . . ." (R. 15).

[13] As Pernell stated in his affidavit filed in the court below in an unsuccessful attempt to persuade that court to reduce bond, he was then working as a furniture mover earning approximately $135 per week in take-home pay. He was the sole support of his wife and three children and had undertaken to support four children of his wife's sister. His bank account then included a balance of approximately $300 (R. 14).

[14] The claim to a jury trial was first asserted in Pernell's answer in the trial court (A. 12), and the constitutional arguments were urged orally to the trial judge. See pp. 10-11, above. On appeal, the constitutional issues were raised in the brief for appellant, pp. 6-22 (R. 78-94), and in the reply brief for appellant, pp. 1-6 (R. 153-58).

possession in the eviction proceeding, or on the money damage claims asserted at the same proceeding (A. 14). The court's lengthy opinion considered a range of historical and precedential arguments but, in essence, rested its decision on a construction of several decisions of this Court (A. 22-24, 28) and on the assertion that neither the statutory eviction proceeding nor claims arising out of a warranty of habitability were known to the common law (A. 17-18, 26-27).

Under District law, compelled eviction of a tenant does not abate his right to regain possession if his eviction is reversed on appeal.[15] In addition, if the decision below is reversed, Pernell will be entitled to pursue his money claims based on set off and counterclaim in the Superior Court in a trial by jury. Reversal of the judgment below will also prevent the judgment of the trial court from having any collateral estoppel effect, which it may otherwise be claimed to have (see p. 52, below), on any claim by Southall for rent which it has alleged as owing by Pernell as the result of his occupancy of the premises.

SUMMARY OF ARGUMENT

The language of the Seventh Amendment shows, and decisions of this Court confirm, that the constitutional standard for trial by jury is basically historical and analytical: the right is preserved where the claim is a "legal" claim that would be tried to a jury under the English common law prevailing when the Seventh Amendment was adopted. *E.g., Parsons v. Bedford*, 28

[15] *Westmoreland v. Weaver Bros., Inc.*, 295 A.2d 506 (D.C. Ct. App. 1972); *Zindler v. Buchanon*, 61 A.2d 616 (D.C. Mun. Ct. App. 1948).

U.S. (3 Pet.) 433 (1830); *Ross v. Bernhard*, 396 U.S. 531 (1970). Where the claim at issue is statutory, the right to a jury trial is determined by whether the new claim finds its closest historical counterpart in claims triable to a jury at common law or falls under a different head of jurisdiction—such as equity—where a jury trial was not available. *E.g., Hepner v. United States*, 213 U.S. 103 (1909); *Luria v. United States*, 231 U.S. 9 (1913). The Seventh Amendment applies with full force to trials in the District of Columbia. *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); see *Bolling v. Sharpe*, 347 U.S. 497 (1954).

In a proceeding brought by a landlord under the District of Columbia statute here involved, the right asserted is the right to possession and the remedy sought is eviction. Historically, such claims have been tried to juries for over eight centuries in classic common law suits such as novel disseisin, writ of entry, and ejectment. II F. Pollock & F. Maitland, *History of English Law* 47-52 (2d ed. 1968). This Court has repeatedly stated that actions to recover real property are legal actions subject to the Seventh Amendment. *E.g., Whitehead v. Shattuck*, 138 U.S. 146 (1891); *Ross v. Bernhard, supra*. The right to a jury trial is not lost because the action has been simplified through the evolution of the law (see *Parsons v. Bedford, supra*), and the courts have repeatedly applied the Seventh Amendment to claims whose common law lineage was far more remote. *E.g., Meeker & Co. v. Lehigh Valley R.R.*, 236 U.S. 412 (1915); *Olearchick v. American Steel Foundries*, 73 F. Supp. 273 (W.D. Pa. 1947).

So far as prudential considerations may be given weight, the factual issues presented in a landlord and tenant suit are eminently suitable for the common sense judgment of a jury. The severity of the eviction remedy is

a further reason why a jury's intervention is appropriate. Claims that it is not feasible to afford jury trial in statutory eviction proceedings are unpersuasive, even assuming that such arguments could be entertained in the face of the judgment implicit in the Seventh Amendment; not only are juries widely employed in statutory eviction proceedings by numerous states (see, *e.g.*, *Lindsey v. Normet*, 405 U.S. 56 (1972)), but they have been afforded continuously in the District for over 150 years. In 1970 Congress omitted the statutory guarantee on the assumption that it was "superfluous in light of constitutional jury trial requirements . . . ." H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 164 (1970).

Independently, a tenant is entitled to a jury trial under the Seventh Amendment on his claims for money damages asserted in the same District eviction proceeding. The claims here asserted are intrinsically contract claims, and contract claims for money damages are paradigm common law claims triable to a jury. *E.g.*, *Simler v. Conner*, 372 U.S. 221 (1963); 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2316 (1971). The factual issues raised by these claims largely overlap those raised by the landlord's eviction claim, they are no less suitable for jury resolution, and disposition of all such claims in a single proceeding serves the goal of judicial efficiency. See generally *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963).

The contention that *Lindsey v. Normet*, *supra*, supports a denial of jury trial on the tenant's claims for money damages is mistaken. That case, which involved no Seventh Amendment question, held that a state could allow eviction of a tenant and defer his damage claims for trial in a later proceeding; in this case the tenant's claims were permitted by District law in the eviction proceeding, and jury trial attached to those claims under the Seventh

Amendment. Congress has not sought to make the tenant waive his right to jury trial in order to assert money damage claims in an eviction proceeding, and it would be unconstitutional for it to do so since there is here no overriding state interest to justify a burden upon the exercise of a basic constitutional right. See, *e.g.*, *United States v. Jackson*, 390 U.S. 570 (1968); *Sherbert v. Verner*, 374 U.S. 398 (1963).

ARGUMENT

I. UNDER THE SEVENTH AMENDMENT, A RIGHT TO TRIAL BY JURY EXISTS IN THE SUPERIOR COURT WHERE THE HISTORICAL COUNTERPART OR ANALOGUE TO THE CLAIM IN DISPUTE IS A COMMON LAW CLAIM TRIABLE BY JURY.

A. The Constitution Embodies a Historical Standard Which, at Minimum, Entitles a Party to a Trial by Jury Where the Corresponding Claim Was Triable to a Jury Under English Practice in 1791.

The Seventh Amendment provides in pertinent part that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."[16] This language shows--

[16] The Seventh Amendment's requirement that "the value in controversy shall exceed twenty dollars" is readily met in this case and the lower court did not suggest otherwise. It is well established that in actions for repossession of leased premises, the amount in controversy is determined by the rent reserved for the period in question plus the value of any improvements. *Harris v. Barber*, 129 U.S. 366 (1889); *Willis v. Eastern Trust and Banking Co.*, 167 U.S. 76 (1897); *Battle v. Atkinson*, 115 Fed. 384 (C.C. E.D. Ark. 1902), *aff'd*, 191 U.S. 559 (1903). In the present case, the lease required monthly payments of $150 and in its complaint, Southall alleged that Pernell was in default of payment for three months' rent in the amount of $375. See p. 8, above.

and the decisions and commentators confirm—that the constitutional test is basically historical and analytical: the right to jury trial is preserved where a claim at issue in the judicial proceeding corresponds to one triable by a jury under English common law in 1791, when the amendment was adopted, in contradistinction to those cases where a jury trial was not afforded, most importantly, those falling within the equity or admiralty jurisdictions of the courts. *E.g.*, *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830); *Ross v. Bernhard*, 396 U.S. 531 (1970).[17]

The *locus classicus* of this construction is this Court's opinion in *Parsons v. Bedford, supra*. There, Justice Story stated:

> "By common law [the framers of the Constitution] meant . . . not merely suits, which the common law recognised among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognised, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit. . . . In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may

[17] See generally 5 W. Moore, *Federal Practice* para. 38.08[5], at 80-81 (2d ed. 1971) (hereafter "Moore"); F. James, *Civil Procedure* §8 (1965) (hereafter "James"); 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2302 (1971) (hereafter "Wright & Miller"). Although the amendment "preserves" rather than establishes the right in all such suits, the difference is rarely significant. Trial by jury existed in almost all common law proceedings with a few notable exceptions such as habeas corpus, bankruptcy and suits against the state. See Moore para. 38.08[5], at 85.

be the peculiar form which they may assume to settle legal rights." 28 U.S. (3 Pet.) at 447.

See also J. Story, *Commentaries on the Constitution of the United States* 654-56 (L. Levy ed. 1970). The governing distinction has been followed in numerous subsequent cases (*e.g.*, *Insurance Co. v. Comstock*, 83 U.S. (16 Wall.) 258 (1872); *United States v. Louisiana*, 339 U.S. 699 (1950)), and the passage was recently quoted and cited with approval in *Ross v. Bernhard*, 396 U.S. at 533, where the minority opinion also adopted the historical standard but disagreed about its application to the particular claims. 396 U.S. at 543-44.

Indeed, the only recent controversies arising from the application of this standard relate to cases where, as in *Ross v. Bernhard*, the merger of law and equity has created new situations not likely to have been faced under the old dual procedure. The problems have arisen, typically, where a claim or aspect of it would arguably have been deemed equitable under the old classifications but is now entangled with legal claims or is susceptible to legal resolution under the merged procedure.[18] No such difficulty is presented in this case; it was never suggested by the lower court that the claims here in issue fall, in whole or in part, within the jurisdiction of equity.

These recent decisions do, however, illustrate a principle of long standing in the application of the

[18] In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), the question was one of priority of trial where both legal and equitable claims were presented in the same proceeding. *Dairy Queen v. Wood*, 369 U.S. 469 (1962), involved a claim that, under the merged procedure, could be deemed akin either to a legal claim (a damage action) or an equitable claim (an action for accounting). *Ross v. Bernhard* presented the anomoly of a dual claim which, judged by historical standards, involved both legal and equitable aspects.

Seventh Amendment, namely, that all doubts are to be resolved in favor of jury trial. See, *e.g., Scott v. Neely*, 140 U.S. 106, 109-10 (1891); *Beacon Theatres v. Westover, supra,* 359 U.S. at 510. This comports with the history of the Seventh Amendment which is animated by concern for the importance of jury trial. It is a familiar fact that the absence of a civil jury guarantee in the original Constitution led several states to the brink of withholding an unconditional ratification and spurred adoption of the Bill of Rights by the first Congress.[19]

Consonantly, from the early decisions onward, this Court has emphasized that "the trial by jury is justly dear to the American people" and has "always been an object of deep interest and solicitude . . . ." *Parsons v. Bedford, supra,* 28 U.S. (3 Pet.) at 446. More recently, the Court stated that a "right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York City*, 315 U.S. 752-53 (1942). This emphasis has been repeatedly applied in characterizing disputed claims as legal (*e.g., Parsons v. Bedford, supra; Dairy Queen v. Wood, supra*), as well as in other matters such as determining the priority of trial where legal and equitable claims both appear. *Scott v. Neely, supra; Beacon Theatres v. Westover, supra.*

B. Where the Claim at Issue Has Been Incorporated in a Statute or Otherwise Altered by the Development of the Law, It Is Subject to Jury Trial If Its Closest Historical Analogue Is an Action Triable to a Jury at Common Law.

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[19] See *Colgrove v. Battin*, ___ U.S. ___ (1973); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377-87 (1913); Henderson, "The Background of the Seventh Amendment," 80 *Harv. L. Rev.* 289 (1966).

The claims advanced by litigants in the courts have been undergoing change in both their substantive and procedural aspects ever since the ancient writs established the earliest "forms of action." See F. Maitland, *The Forms of Action at Common Law* (1962 ed.) (hereafter "Maitland"). Yet it is well settled that the Seventh Amendment applies to suits which adjudicate legal rights and remedies whether or not such modifications have been adopted. As Justice Story pointed out in *Parsons v. Bedford, supra,* at the very time the Seventh Amendment was adopted "probably, there were few, if any, states in the Union, in which some new legal remedies, differing from the old common-law forms, were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law." 28 U.S. (3 Pet.) at 447.

While certain of the changes have reflected the evolution of judge-made law, many claims have now been altered by or embodied in statutes. This Court has always applied the Seventh Amendment in such cases by determining whether the statutory claim found its closest historical analogue in a legal claim triable to a jury at common law.[20] The same standard has been employed by the lower federal courts and supported by the commentators.[21]

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[20] *E.g., Luria v. United States*, 231 U.S. 9, 27-28 (1913); *Crowell v. Benson*, 285 U.S. 22, 45 (1932); *Beacon Theatres v. Westover*, 359 U.S. 500, 510 (1959); *Dairy Queen v. Wood*, 369 U.S. 469, 477 (1962).

[21] *Simmons v. Avisco*, 350 F.2d 1012, 1018 (4th Cir. 1965); *Dasho v. Susquehanna Corp.*, 461 F.2d 11 (7th Cir.), *cert. denied*, 408 U.S. 925 (1972); *Brady v. Trans World Air Lines, Inc.*, 196 F. Supp. 504, 507 (D. Del. 1961); *United States v. Jepson*, 90 F. Supp. 983, 986 (D. N.J. 1950); 5 Moore para. 38.11[7]; James §8.6; Wright & Miller §2316, at 79.

For example, in *Hepner v. United States, supra,* this Court recognized that trial by jury was guaranteed where the United States brought an action, corresponding to a common law action of "debt," to collect a civil penalty established by statute. 213 U.S. at 115. Conversely, in *Luria v. United States, supra,* the Seventh Amendment was held inapplicable to a statutory proceeding to cancel a naturalization certificate on grounds of fraud, since the Court analogized the proceeding to one cognizable in equity under traditional practice. 231 U.S. at 27-28. With increasing codification it seems probable that most actions presenting federal questions have, at least since *Erie v. Tompkins,* 304 U.S. 64 (1938), involved federal statutory claims.

In applying the test of historical analogy, this Court has looked to the pre-merger custom both as it related to the right involved and to the nature of the remedy sought. See *Ross v. Bernhard, supra,* 396 U.S. at 533, 538.[22] While there are areas of overlap, different rights and remedies have historically been associated with legal and equitable claims respectively in a number of fields. As *Ross v. Bernhard* explained:

> "However difficult it may have been to define with precision the line between actions at law dealing with legal rights and suits in equity dealing with equitable matters . . . some proceedings were unmistakably actions at law triable to a jury. The Seventh Amendment for example, entitled the parties to a jury trial in actions for damages to a

[22] The dissenting opinion in *Ross v. Bernhard*, while disagreeing about the application of the historical standard to the case at hand, stated that "where a new cause of action is created by Congress, and nothing is said about how it is to be tried, the jury trial issue is determined by fitting the cause into its nearest historical analogy." 396 U.S. at 543 n. 1.

person or property, for libel and slander, for recovery of land, and for conversion of personal property." 396 U.S. at 533 (footnote omitted).

Where a statute explicitly classifies a claim as triable to a jury, of course a jury trial will automatically be provided since Congress is free to employ this method even where it is not required by the Seventh Amendment. See *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963).[23] Where the constitutional question is squarely presented, as when Congress has failed to specify the mode of trial, naturally the courts must decide whether the claim is one subject to the constitutional guarantee of jury trial. Ultimately, of course, this Court is the final arbiter of the question whether a constitutional right applies. See, *e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641, 651 n. 10 (1966); *Trop v. Dulles*, 356 U.S. 86, 94-96 (1958).

C. The Seventh Amendment Applies With Full Force and Effect in the District of Columbia Courts Established by Act of Congress.

The District of Columbia Government, and its agencies and its courts are creatures of the Federal Government and are, accordingly, constrained by the guarantees of the Bill of Rights. Thus, this Court stated in *Capital Traction Co. v. Hof, supra,* that "it is beyond doubt, at the present

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[23] There are numerous federal statutes which provide a right to a trial by jury. See 5 Moore para. 38.12. Certain of these provisions extend the right to jury trial where it would not otherwise apply, as in certain condemnation proceedings. *Id.* para 38.12[5]. In still other cases—such as suits to forfeit articles seized on land—various statutes provide a right of trial by jury even though it would exist in the absence of any statutory provision. *Id.* para. 38.12[7], at 135.

day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or criminal cases, are applicable to the District of Columbia." 174 U.S. at 5 (Seventh Amendment). *Accord, Callan v. Wilson*, 127 U.S. 540, 550 (1888) (Sixth Amendment). The governing principles were summarized in the decision in *Curry v. District of Columbia*, 14 App. D.C. 423 (D.C. Ct. App. 1899), rendered not long after *Callan* and *Hof*:

> "The power of Congress in the District of Columbia, as elsewhere throughout the Federal Union, is distinctly limited by all the express guaranties of individual right contained in the Federal Constitution. No more in the District of Columbia than anywhere else within the United States could the legislature of the Union pass a bill of attainder or an *ex post facto* law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches." *Id.* at 439.

The Superior Court of the District of Columbia is not, of course, an Article III court. In this respect it is similar to the territorial courts, established by Congress in the western territories prior to their statehood, whose proceedings were equally subject to the Seventh Amendment. *E.g., Thompson v. Utah*, 170 U.S. 343, 346 (1898). As this Court explained in *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 219 (1916), "although territorial courts of the United States are not constitutional courts, nevertheless as they are courts created by Congress and exercise jurisdiction alone by virtue of power conferred by the law of the United States, the provisions of the Seventh Amendment are applicable in such courts."

This Court has similarly held that the Bill of Rights guarantees are directly applicable to the District of

Columbia Government in other contexts. For example, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), it was held that the District of Columbia school system—although not subject to the Fourteenth Amendment's guarantee of equal protection—was directly subject to the Fifth Amendment's due process clause which embodied comparable protection against racial discrimination. Consonantly, in *Public Utilities Commission v. Pollack*, 343 U.S. 451 (1952), the Court deemed a District of Columbia regulatory agency subject to the constraints of the First Amendment.

But for the direct application of the Bill of Rights, the District of Columbia's citizens would be bereft of basic constitutional guarantees in their relations with their local agencies and courts. For, the District of Columbia is not a state for purposes of the Fourteenth Amendment (*Bolling v. Sharpe, supra*, 347 U.S. at 499) nor does it have the benefit of a local bill of rights comparable to those in state constitutions. The District of Columbia courts have long acknowledged that the Bill of Rights guarantees apply directly to the District (see, *e.g.*, *Curry v. District of Columbia, supra*), and the lower court's decision in the present case rested directly upon the Seventh Amendment.

II. A JURY TRIAL MUST BE AFFORDED UNDER SEVENTH AMENDMENT STANDARDS IN A STATUTORY EVICTION PROCEEDING WHICH DETERMINES THE RIGHT TO POSSESSION OF REAL PROPERTY AND PROVIDES A REMEDY OF EVICTION.

A. The Closest Historical Analogues of the Statutory Eviction Proceeding Are Long Standing Common Law Actions Which Included a Right to Trial by Jury.

The statutory eviction proceeding here at issue is designed to determine the right to possession of real property, and it provides a remedy of eviction for the landlord where the tenant is found to be wrongfully in possession. It cannot be fairly disputed that the historical counterparts or closest historical analogues of such a proceeding are the several common law actions used to recover possession of real property. These actions, which are virtually classic examples of common law actions, were all triable to a jury both in origin and at the time the Seventh Amendment was adopted.

Most notable among the classic possessory actions, which developed to supplement still older real actions directed at determining title, are three which are particularly relevant to this case: the assize of novel disseisin, the writ of entry, and the action in ejectment.[24]

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[24] See generally Maitland 27-29, 39-42, 57; T. Plucknett, *A Concise History of the Common Law* 358-62, 373-74 (5th ed. 1956) (hereafter "Plucknett"); *Urciolo v. Evans*, 99 D.W.L.R. 1729 (D.C. Superior Ct. 1971) (reported in part). The *Urciolo* opinion summarizes the historical materials and applies them directly to the statutory eviction proceeding at issue in this case. The court below,

Although varying in many respects, the basic thrust of each of these three forms of action was to try the right of possession to real property. Thus, novel disseisin—which is one of the earliest of the old writs and dates back to the twelfth century—came into being *solely* to restore possession to one wrongfully ousted from it, and the plea of title would not even be considered as a defense. Maitland 28; Plucknett 358-59.[25] The writ of entry, which developed in the thirteenth century, was in one respect even closer to the present case, since one of its recorded variations—the writ of entry *ad terminum qui praeterit*—"lay to recover lands against one who held them originally for a term of years, which term had expired." Plucknett 362 (footnote omitted); Maitland 39.

Lastly, ejectment, emerging as a variant of trespass on the case in the fifteenth century, provided a counterpart remedy: in its origins it was designed to restore a term tenant, wrongfully dispossessed from his land, to possession of it. Maitland 47-48; Plucknett 373-74. The office of ejectment ultimately was enlarged to the point that, by the mid-nineteenth century, ejectment had become the usual method of trying the right to possession under practically all circumstances. Plucknett 373-74. However, the other forms of action remained available in England until the late nineteenth century when they were abolished by Parliament. *Id.*

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while disagreeing with *Urciolo*'s ultimate conclusion that jury trial attached in an eviction proceeding, described the opinion as scholarly and took no exception to its historical analysis (A. 20, 22). A copy of the full opinion is attached to the petition for certiorari in this case.

[25] This Court has several times noted the emphasis on the right to possession, as opposed to title, in novel disseisin. See *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133, 134 (1915); *Lindsey v. Normet*, 405 U.S. 56, 68 n. 14 (1972).

The other dominating characteristic of these three proceedings is that in each one trial by jury was employed to determine the right to possession. In novel disseisin, the use of the jury was obligatory—a direction to summon the jury was part of the original writ—as was true of the 1793 Maryland statute first adopted in the District. See p. 3, above.[26] In entry and in ejectment, the jury was demandable as of right although, as in modern practice, the parties were free to dispense with it. See Maitland 39; Plucknett 130.

In light of this lineage, it is not surprising that this Court and the commentators have uniformly regarded actions to recover possession of real property as legal actions par excellence for which a jury trial is guaranteed by the Seventh Amendment. For example, in *Scott v. Neely*, 140 U.S. 106, 110 (1891), the Court stated:

"All actions which seek to recover specific property, real or personal, with or without damages for its

[26] Maitland 27. Maitland reprints a sample writ, translated as follows:

"The King to the sheriff greeting. A hath complained unto us that X unjustly and without judgment hath disseised him of his freehold in Trumpington after (the last return of our lord the king from Brittany into England). And therefore we command you that, if the aforesd A shall make you secure to prosecute his claim, then cause that tenement to be reseised and the chattels which were taken in it and the same tenement with the chattels to be in peace until the first assize when our justices shall come into those parts. And in the mean time you shall cause twelve free and lawful men of that venue to view that tenement and their names to be put into the writ. And summon them by good summoners that they be before the justices aforesd at the assize aforesd, ready to make recognizance thereupon. And put by gages and safe pledges the aforesd X or, if he shall not be found, his bailiff, that he be then there to hear that recognizance. And have there the (names of the) summoners, the pledges, and this writ." *Id.* 83-84 (footnotes omitted).

> detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the Federal courts only on their law side."

Later in the same term, the Court employed similar language in *Whitehead v. Shattuck*, 138 U.S. 146 (1891), in holding that an equitable action to recover real property was not permitted where ejectment provided an adequate remedy at law. Citing and quoting from earlier decisions, the Court explained that such a general rule was necessary "because the defendant has a constitutional right to trial by jury." *Id.* at 151. More recently, in *Ross v. Bernhard, supra,* this Court cited *Whitehead* for the proposition that the Seventh Amendment entitled parties to a jury trial in actions *inter alia* "for recovery of land." 396 U.S. at 533.

Precisely the same view has been taken by the commentators. Thus Wright & Miller state that "it is clear, for example, that there is a right to jury trial in actions . . . for recovery of land . . . ." § 2316, at 77. The lower federal courts follow the same view. Especially pertinent is *National Life Ins. Co. v. Silverman*, 454 F.2d 899 (D.C. Cir. 1971), since the proceeding in question was brought under the District's statutory eviction proceeding to recover possession of a hotel. With respect to the claim for possession, the court held that the Seventh Amendment entitled the possessor to a trial by jury, citing the *Whitehead* decision. *Id.* at 906.

The lower court in this case sought to draw distinctions between the older forms of action described above and the present statutory eviction proceeding. It said, for instance, that title was always involved, "at least conceptually," in actions in ejectment (A. 18). This certainly would not distinguish novel disseisin, where title was irrelevant (p. 26, above), and it is not even accurate

as applied to ejectment. As previously noted, ejectment originated as an action brought by the tenant—who by definition had no title—to protect him against a wrongfully dispossessing landlord, who admittedly had title. P. 26, above. In its mature form, "the purpose of ejectment at common law has always been primarily to determine the question of the right to possession, and secondarily the question of title, if that question be raised . . . ." *Shapiro v. Christopher*, 90 U.S. App. D.C. 114, 122, 195 F.2d 785, 793 (1952). In this respect it is precisely comparable to the statutory eviction proceeding employed in the District.[27]

The court below also implied that the "summary" character of the statutory eviction proceeding is a basis for distinguishing the older forms. This label is dubious as applied to the statutory eviction proceeding,[28] and even if accurate it would not provide a ground of distinction: novel disseisin "was, according to the notions of the time, and it would be even according to our own notions, a summary action." II F. Pollock & F. Maitland, *History of English Law* 48 (2d ed. 1968) (hereafter "Pollock & Maitland"); Maitland 29. In any event, there is nothing whatever inconsistent between summary procedures—*e.g.*, the narrowing of issues to be litigated, the use of

[27] There is no dispute that the question of title may be injected in a statutory eviction proceeding in the District. Under the older statutes, the proceeding was continued in a different court when an issue of title was raised, and today the title question can be resolved in the same court. See pp. 4, 7, above.

[28] In such a proceeding, the landlord can recover not only his real property but also furniture and past rent. The tenant can litigate not only the issue of nonpayment of rent but also defenses based on the landlord's lack of title, his violation of housing regulations, and his failure to maintain the premises in habitable condition. See pp. 4, 7, above.

expedited scheduling—and the provision of trial by jury. See *443 Cans of Frozen Egg Product v. United States*, 226 U.S. 172, 183 (1912); *Lindsey v. Normet*, 405 U.S. 56, 63 (1972).

Finally, the lower court suggested that the present statutory eviction proceeding cannot be akin to common law ejectment because there is a little used statutory proceeding for ejectment for nonpayment of rent contained in D.C. Code §16-1124 (1967). In fact, this so-called "ejectment" proceeding for nonpayment of rent is not, strictly speaking, common law ejectment but is derived directly from a British statute passed in 1731 which, in significant respects, was designed to streamline the proceedings for recovery of property for nonpayment of rent by a tenant. Compare D.C. Code §16-1124(a) (1967) with 4 Geo. 2, ch. 28, §2 (reprinted in relevant part following §16-1124). See also *Connor v. Bradley*, 42 U.S. (1 How.) 211 (1843). The statutory eviction proceeding is no less a modernized descendent of common law actions than D.C. Code §16-1124 itself.[29]

Even if the various distinctions sought to be drawn by the lower court were accurate, which they are not, they would have little relevance to the Seventh Amendment question presented in this case, and the lower court's reliance upon such distinctions shows rather that it has fundamentally misconceived the governing constitutional standard. Few statutory proceedings are identical in every detail to the common law actions they replace or modify, or else the statute would be unnecessary. For Seventh Amendment purposes, the decisive point is that both the

[29] As the *Connor* case shows, even in its revised form this new proceeding was cumbersome. 42 U.S. (1 How.) at 217-18. This undoubtedly explains why, as the statutory history in the District shows, further simplifications to achieve the present statutory eviction proceeding were introduced and the simplified procedure extended to an ever-increasing class of cases. See pp. 5-6, above

right at issue in the District's statutory eviction proceeding—the right to possession of real property—and the remedy sought—eviction—find direct counterparts in common law actions where trial by jury has long been assured. It is these fundamental similarities that are controlling and not variations in matters of form and procedure.

The principle that the Seventh Amendment is directed to the fundamental nature of the claim and not to the transient forms or procedures which may be employed has been repeated by this Court and the lower federal courts on numerous occasions ever since *Parsons v. Bedford*. See pp. 20-21, above. Statutory proceedings far less familiar to the common law than eviction suits have been recognized as sufficiently analogous to common law actions to require trial by jury.[30] The approach taken by the lower court is not only inconsistent with decisions of this Court so interpreting and applying the Seventh Amendment for over 150 years but, in a period of procedural evolution and increasing codification of substantive law, the lower court's approach would render the Seventh Amendment virtually an anachronism.

B. Prudential Considerations Also Support the Provision of Jury Trial in Statutory Eviction Proceedings.

In addition to the historical and analytical standards already discussed, reference has occasionally been made

[30] *E.g.*, *Dairy Queen v. Wood*, *supra* (statutory trademark action for damages); *Meeker & Co. v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915) (reparation action under the Interstate Commerce Act); *Simmons v. Avisco*, 350 F.2d 1012 (4th Cir. 1965) (damage suit for violation of Labor-Management Reporting and Disclosure Act); *Martin v. Detroit Marine Terminals, Inc.*, 189 F. Supp. 579 (E.D. Mich. 1960) (suit for overtime compensation under the Fair Labor Standards Act).

to "the practical abilities and limitations of juries" in determining whether an issue is "legal" for Seventh Amendment purposes. See *Ross v. Bernhard, supra,* 396 U.S. at 538. Since the Seventh Amendment standards have always been deemed essentially historical and analytical, this consideration could not operate to deny a defendant a right to a trial by jury where, as here, the claim at issue found its direct counterparts in actions triable to a jury at common law. See James §8.11. However, in this instance such practical considerations do not detract from but strongly support the proposition that the statutory eviction proceeding here at issue is subject to a jury trial.

The factual issues presented in this case and in the typical eviction proceeding are preeminently suitable for a jury's disposition. Judged by the limited number and the simplicity of the contested issues, such eviction proceedings are vastly more fit for a lay jury than highly complex securities, antitrust, and other commercial controversies routinely submitted to juries in federal courts.[31] And, judged by the severe social consequences of an eviction, the use of the jury is certainly more appropriate in an eviction proceeding than in practically any other civil case that comes to mind. See p. 35, below.

In the present litigation, the central question was whether Pernell was liable to eviction for nonpayment of

[31] See, *e.g., Dairy Queen v. Wood, supra; Beacon Theaters v. Westover, supra; Dasho v. Susquehanna Corp., supra. Beacon Theaters*, for example, involved claims by the plaintiff for declaratory relief presenting issues under the Sherman Act and Clayton Act as they applied to the practices of distributing first run motion pictures. The defendant filed a counterclaim against the plaintiff and a cross claim against an intervening party, it charged a conspiracy existed to manipulate contracts and clearances, and it demanded treble damages. 359 U.S. at 502-03.

rent. Southall contended that Pernell had made no rental payments for several months and had not undertaken any repairs which would entitle him to credit against his rent. See p. 11, above. It was Pernell's position that Southall had agreed that he could set off the cost of repairs against his rent, that he had made numerous repairs and expended $389.60 for the purchase of necessary items, and that Southall had in addition to the credit against rent agreed to pay $300 to Pernell for making these specified repairs himself. See pp. 9, 11-12, above.[32] Pernell also contended that the landlord had not complied with District housing regulations requiring a habitable residence so that under *Javins* his obligation to pay rent was proportionately abated. See pp. 9, 11-12, above.[33]

What rent had been paid by the tenant, what agreement had been reached between him and his landlord, and what repairs had been made by either party are elementary questions of fact readily determined by a jury. Whether the premises were decently maintained by the landlord, consistent with the District's housing regulations, is equally an appropriate question for the sensible judgment of jurors residing in the same com-

[32] The promise of the $300 payment is recorded in the lease (R. 53). The asserted promise of the landlord to credit the cost of repairs against lease payments was oral and would have been testified to by Pernell. The expenditures depend both on oral and documentary evidence; receipts for expenditures were tendered to the trial court but refused for lack of an authenticating witness (R. 17, 62).

[33] Southall's failure to maintain the premises in habitable condition could not have been excused by assuming that the burden of repairs was shifted to Pernell. Quite apart from the question whether the obligation can be delegated, Pernell only agreed to make several specific repairs (R. 53); he asserted that he did make those repairs but offered evidence to show that more was necessary to render the premises habitable. See pp. 11-12, above.

munity. Habitability does not turn on highly technical violations of the housing regulations. The question under the governing decision in *Javins* is whether a decent and habitable dwelling has been maintained by the landlord, giving due regard to the requirements of the regulations.[34] It would be difficult to find questions of fact and factual inference that better invoke the fundamental assumptions on which jury trial is based. This Court has observed that the purpose is to assemble men who represent "the average of the community" who "sit together, consult, apply their separate experience of the affairs of life to the facts proven." *Railroad Company v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1874). The Court continued:

> "This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Id.*

The jury is appropriate in an eviction proceeding for yet another reason. The tenant's home, by providing protection for him and his family, supplies one of the most fundamental wants in society. In *Shapiro v.*

[34] *Javins* determined that the common law, as it has evolved, imposes on a landlord an obligation to keep his premises in "a habitable condition" (138 U.S. App. D.C. at 375, 428 F.2d at 1077) and the decision points out that this obligation was re-confirmed by the District's housing regulations' broad requirement that premises "be maintained and kept in repair so as to provide decent living accommodations for the occupants." *Id.* at 379, 428 F.2d at 1081. *Javins* expressly held that "the jury should be instructed that one or two minor violations standing alone which do not affect habitability are *de minimis* and would not entitle the tenant to a reduction in rent." *Id.* at 380 n. 63, 428 F.2d at 1082 n. 63.

Thompson, 394 U.S. 618, 627 (1969), this Court described shelter as one of "the very means to subsist," and the importance of achieving and safeguarding adequate lodgings has been repeatedly recognized in a variety of contexts.[35] The wrongful ouster of a family may have consequences that are scarcely less severe than a wrongful criminal conviction. When juries can be freely had in the most rarified commercial disputes between corporations, it would be curious and disturbing to conclude that a jury should be denied in a proceeding which may cost a man his home.

While agreeing that Seventh Amendment questions cannot be resolved on the basis of "caseloads, statistics, or expedients" (A. 29), the court below suggested that jury trials in eviction proceedings might result in a flood of prolonged cases (A. 29). There is no basis for this suggestion. The vast majority of landlord and tenant cases filed each year in the District are settled by the payment of rent or surrender of the premises without any trial at all, and jury demands are made only in a small minority of cases.[36] Since juries have been available in statutory eviction proceedings in the District of Columbia from 1801 until the decision below, it is particularly farfetched

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[35] *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Escalera v. New York Housing Authority*, 425 F.2d 853 (2d Cir. 1970); *Javins v. First National Realty Corp.*, *supra*; Housing Act of 1949 §1, 42 U.S.C. §1441 (1970); Housing and Urban Development Act of 1968, 12 U.S.C. §1701 (1970); D.C. Housing Regs. §2910 (1956); President's Committee on Urban Housing, *A Decent Home* 1, 47-48 (1968); National Commission on Urban Problems, *Building the American City* 1-10 (1968).

[36] In *Tutt v. Doby*, 148 U.S. App. D.C. 171, 176, 459 F.2d 1195, 1200 (1972), the court estimated that no more than three percent of proceedings begun to evict tenants ever went beyond the threshold stage.

to assert that this practice, now over a century and a half old, could frustrate the operations of a court.

What is more, many states expressly provide for trial by jury in summary eviction proceedings.[37] Merely as an example, the Oregon statutory eviction proceeding scrutinized in *Lindsey v. Normet, supra,* explicitly provided for trial by jury, even though the proceeding was far more summary and narrow than the proceeding at issue in this case. See 405 U.S. at 61 n. 3. If states as diverse as Arizona and Illinois and Oregon afford jury trials in statutory eviction proceedings, without any compulsion from the Seventh Amendment, it cannot be beyond the ability of the District of Columbia courts to do so. The courts are not without tools to expedite cases even where jury trials are involved. See, *e.g.,* D.C. Superior Court Civil Rule 38-I (providing for six-man juries).

The denial of a jury trial to tenants in the statutory eviction proceeding would be especially anomalous because the landlord, if he wished to do so, could readily secure a jury trial. As previously noted, D.C. Code §16-1124 (1967) embodies an alternate procedure, more cumbersome and therefore little used, for recovery of property for nonpayment of rent. See p. 30, above. The

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[37] *E.g.,* Arizona: Ariz. Rev. Stat. Ann. §12-1176 (1956); Colorado: Colo. Rev. Stat. Ann. R. Civ. P. 38(a) (1970); Georgia: Ga. Code Ann. §§61-304, 105-1601-02 (1966); Illinois: Ill. Rev. Stat. ch. 57, §11a (1971); Indiana: Ind. Stat. Ann. §32-7-3-4, §32-7-3-12 (Burns Code Ed. 1973); California: Cal Code Civ. Pro. §1171 (West 1972); Connecticut: Conn. Gen. Stat. Rev. §51-266, §52-463 (1968); Kansas: Kan. Stat. Ann. §61-2309 (1972 Supp.); Kentucky: Ky. Rev. Stat. Ann. §383-210 (1969); Michigan: Mich. Stat. Ann. §27A.5738 (1973 Supp.); New York: N.Y. Real Prop. Actions §745 (McKinney 1963); Ohio: Ohio Rev. Code Ann. §1923.10 (Page 1968); Oregon: Ore. Rev. Stat. §§105.130, 150.150 (1971).

lower court acknowledged a jury trial might well be available in that proceeding (A. 17). Theoretically, under the lower court's decision, the landlord could choose between two statutory remedies, each of which would adjudicate the right to possession and permit eviction, but one would entitle the landlord to demand a jury trial and the other would foreclose the tenant from doing so. Compare *Dairy Queen v. Wood, supra,* 369 U.S. at 477-79.

C. The Decisions of This Court Relied Upon by the Lower Court Do Not Support Its Position.

The lower court, in rejecting Pernell's claim to a jury trial on the issue of right to possession, relied importantly on several decisions of this Court. The decision most heavily emphasized was *Capital Traction Co. v. Hof, supra,* decided by the Court in 1899. In the *Hof* case, this Court held—in a damage action brought against a traction company—that jury trial before a justice of the peace was not sufficient to comply with the Seventh Amendment. *Hof* established that the Constitution's guarantee of a jury trial required a jury trial before a full-fledged judge qualified to instruct the jury in matters of law. 174 U.S. at 18.

The court below here reasoned that because *Hof* determined in 1899 that a jury trial before a justice of the peace was not sufficient to comply with the Seventh Amendment, the use of that procedure between 1801 and 1864 in District eviction proceedings shows that those proceedings were not subject to the Seventh Amendment (A. 22-23).[38] Patently, this is a *non sequitur.*

[38] The lower court stated that in its view "*Hof* shatters the picture of a continuous history of jury trials protected by the seventh amendment in summary landlord-tenant possession cases"

What *Hof* shows is that judged by a requirement announced in 1899, the District's procedure from 1801 to 1864 may have been deficient in failing to provide a judge *in addition to a jury* in the eviction proceedings. There is no reason to doubt that Congress in maintaining a justice of the peace court with authority to hold jury trials acted on the misapprehension—corrected many years later in *Hof*—that such trials did comport with the Seventh Amendment.[39]

and the decision "makes it clear" that until the 1864 statute providing for a jury trial in the Supreme Court of the District, "no right to a jury trial within the contemplation of the Constitution was available to the parties to such actions" (A. 23).

[39] When in 1823 Congress extended the authority of the justice of the peace court to recovery of debts exceeding $20, it explicitly provided that "in every action to be brought by virtue of this act, where the sum demanded shall exceed twenty dollars, it shall be lawful for either of the parties to the suit, after issue joined, and before the justice shall proceed to inquire into the merits of the cause, to demand of the said justice that such action be tried by a jury." 3 Stat. 746. The statute went on to provide that the justice should summon jurors subject to the normal qualifications established by District law, that the jurors might be challenged and the challenges disposed of by the justice, that the jury should be sworn, and that the justice should give judgment in accordance with the jury's verdict. *Id.*

Moreover, as this Court's decision in *Hof* observed, the early cases in the District of Columbia courts "would appear, by the brief notes of them in the reports of Chief Justice Cranch, to have proceeded upon the assumption that the trial before a justice of the peace, by a jury empanelled pursuant to the Act of 1823, was a trial by jury within the meaning of the Seventh Amendment to the Constitution . . . ." It was from these early cases (*e.g., Davidson v. Burr*, 2 Cranch C.C. 515 (1824)) that there developed the rule averted to above (see p. 4) that one could not secure a jury trial in both the justice of the peace court and in the Supreme Court on review *de novo*; for this would have meant that the verdict of a jury was being re-examined contrary to the second clause of the Seventh Amendment. See 174 U.S. at 39-40.

The assertion in the lower court's opinion that the historical chain of jury trial in the District has been broken is not only based on a misreading of *Hof* but is, moreover, beside the point. The ultimate question under this Court's decisions construing the Seventh Amendment is whether the present proceeding corresponds closely to common law actions tried to a jury and the overwhelming evidence is that it does. This kinship, which would exist even without regard to the intervening events, is simply illuminated and emphasized by the fact that a jury trial has been afforded continuously in eviction proceedings in the District under the adopted Maryland statute, under the superseding District statute enacted in 1864, and under the succeeding codes and statutes in the District in force into this decade.

The other jury trial decision of this Court principally relied upon by the court below on this aspect of the case is *Block v. Hirsh*, 256 U.S. 135 (1921). There this Court held *inter alia* that the Seventh Amendment right of jury trial was not abridged by a wartime statute giving tenants in the District a right to remain in possession after expiration of their lease at a "reasonable rental" and confiding the determination of what was reasonable to an administrative commission, subject to judicial review. The lower court here concluded that if no jury trial was required in these circumstances, it could not be required in the statutory eviction proceeding under the District's present law (A. 24).

Hirsh accords with and is explained by the principle that Congress may, consistent with the Seventh Amendment, establish totally new substantive rules of public law and entrust their administration to commissions and agencies. In *Hirsh* Congress sought to meet a wartime emergency shortage of housing in the District by abrogating the landlord's right to evict his tenant after the

lease expired, and it substituted temporarily a right to hold over subject to a reasonable agency-determined rental. In a more familiar application of the same principle, this Court has held that the Seventh Amendment was not infringed by the creation of new substantive duties and their enforcement by the National Labor Relations Board without trial by jury. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937).[40]

The principle of these cases has no conceivable application here. The landlord's suit to regain possession when the tenant has breached his lease through nonpayment of rent falls among the oldest actions known to the common law. The Superior Court is not an expert agency but a court of record presided over by a judge. Whether a statutory eviction proceeding was subject to jury trial under the Seventh Amendment was not adverted to in the *Hirsh* case, where the Court took pains to point out that the emergency legislation left "little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word." 256 U.S. at 158.

Lastly, in seeking to support a denial of jury trial on the eviction issues the lower court adverted to *Lindsey v. Normet, supra.* That case involved challenges, on equal

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[40] In the normal instance, a proceeding before an agency would not be in the nature of a suit at common law, and the special expertise that agencies are commonly designed to embody is not consistent with the use of the jury. L. Jaffe, *Judicial Control of Administrative Action* 90-91 (1965). There must, of course, be some outer limits; for example, one could hardly satisfy the principle of the Seventh Amendment merely by announcing that a trial court should hereafter be regarded as an expert agency. The important and complex issues raised in this area are not presented here since Congress has not purported to entrust landlord and tenant proceedings to an expert administrative agency.

protection and due process grounds, to Oregon's statutory eviction proceeding and—as the lower court recognized (A. 20)—did not and could not resolve any Seventh Amendment question: this is so both because the Seventh Amendment is not applicable to the states, either directly or through incorporation in the Fourteenth Amendment, and because the Oregon statute did provide for trial by jury.

The lower court suggested, however, that the *Normet* decision establishes that the Oregon statutory eviction proceeding is "plainly distinguishable" from the common law action in ejectment (A. 19). The "one historic difference" between the statutory remedy and ejectment adduced by the lower court (A. 19) is, as it happens, derived from a quoted passage in *Normet* that has nothing to do with distinguishing the statutory remedy from ejectment.[41] In any event, the lower court's basic approach misconceives the issue: every statutory action differs in some respect from a common law counterpart or the statute would not have been passed.

What matters for Seventh Amendment purposes is that the elemental components of the statutory eviction proceeding, the right involved and the remedy sought, are those provided by classic actions at common law in-

[41] In the passage quoted by the lower court (A. 19-20; 405 U.S. at 71), this Court observed that the statutory remedy was prompted at least in part by a desire of state legislatures to prevent the resort to self-help evictions still permitted by the common law and the attendant risk of breach of the peace from forcible expulsions and resistance by the tenant. However, in making this statement this Court plainly was not distinguishing between the action of ejectment and a statutory eviction proceeding. The action of ejectment was not a warrant to the tenant to exercise self help: it was a legal proceeding which terminated in a judgment for possession (see II Pollock & Maitland 109, 570-71 n. 3) and there is nothing in *Normet* which suggests the contrary.

cluding novel disseisin, writ of entry, and ejectment. In fact, the *Normet* decision invoked novel disseisin in explaining that the basic approach of the Oregon statute, focusing purely on the right to possession, had firm roots in history. See 405 U.S. at 68 n. 14. In all events, cases from *Parsons v. Bedford* through the most recent decisions in this Court dealing with jury trial put to rest any thought that the right may be withheld because of incidental differences in procedure and practice which make the new claim an improvement upon older ones.

III. THE SEVENTH AMENDMENT ALSO REQURES A JURY TRIAL ON THE TENANT'S MONEY CLAIMS ARISING FROM THE LANDLORD'S BREACH OF HIS LEASE OBLIGATIONS INCLUDING THE IMPLIED WARRANTY OF HABITABILITY.

A. The Historical Counterparts of the Tenant's Money Claims for Breach of Lease Obligations Are Common Law Actions Triable to a Jury.

Independent of the tenant's right to jury trial in defending against eviction in the statutory proceeding, the tenant in this case was entitled under the Seventh Amendment to a jury trial on the issues raised by his affirmative money damage claims. Pernell not only resisted eviction but asserted claims for the recovery of $75 in back rent and $389.60 for improvements made in an effort to bring the premises into partial compliance with the District's housing regulations. It is not disputed that Pernell was entitled to assert these claims in the eviction proceeding and, if successful, to obtain a money judgment against his landlord.

If Pernell had been able to prove that his landlord had violated his lease obligations by failing to maintain the

premises in habitable condition, then under *Javins v. First National Realty Corp. supra,* and *Brown v. Southall Realty Co., supra,* the jury would have been entitled to find that the landlord's breach of his agreement abated Pernell's obligation to pay rent;[42] and, to the extent that Pernell could establish that he had paid rent or purchased improvements in reliance upon the lease, the jury could have awarded damages to him at least up to the amount of rent paid and expenditures made. See Landlord and Tenant Rule 5(b).[43] Consequently, there were several factual questions presented by Pernell's money claims including the question whether and to what extent the landlord had failed to maintain decent premises and whether and to what extent Pernell had made rental payments or expended sums for improvements to make the premises habitable.

These factual issues largely overlap factual issues raised by Pernell's defense to the eviction. This is plainly so with respect to the habitability question, and the

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[42] The warranty of habitability exists not only in the District but in a number of other jurisdictions. *Hinson v. Delis*, 26 C.A.3d 62, 102 Cal. Rept. 661 (1st Dist. 1972); *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1969); *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972); *Rome v. Walker*, 38 Mich. App. 432, 196 N.W.2d 850 (1972); *Kline v. Burns*, 111 N.H. 87, 265 A.2d 248 (1971); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Morbeth Realty Co. v. Rosenshine*, 323 N.Y.S.2d 363 (N.Y.C. Civ. Ct. 1971); *Pines v. Perssion*, 14 Wis.2d 590, 111 N.W.2d 409 (1961).

[43] Under Rule 5(b) of the Landlord and Tenant Rules, the tenant may in defending the action for possession assert his own claims "for a money judgment based on the payment of rent or on expenditures claimed as credits against rent . . . ." See *Javins v. First National Realty Corp., supra,* 138 U.S. App. D.C. at 371, 428 F.2d at 1073; *Clover v. Shapiro*, 99 D.W.L.R. 1897 (D.C. Superior Ct. 1971).

expenditures would also have been relevant to the question whether any rent was owing if they were made to remedy the landlord's omissions and thus achieve compliance with the District housing regulations. In all events the issues raised by Pernell's money claims, if those claims are deemed "legal," would be subject to trial by jury, whether or not a defense to the eviction proceeding standing alone would be subject to the Seventh Amendment. See *Dairy Queen v. Wood, supra,* 369 U.S. at 471; *Beacon Theatres v. Westover, supra,* 359 U.S. at 505.

Claims for money damages are the paradigms of actions triable to juries at common law. Almost every claim for compensatory money damages falls within or is closely analogous to one of the old common law forms of action: most tort claims constitute trespass or trespass on the case, while contract and related claims are usually descendants of common law actions in debt, covenant or assumpsit. See 5 Moore para. 38.11[5]; *Ross v. Bernhard, supra,* 396 U.S. at 533. As Professor Moore states elsewhere, "the traditional, although not the exclusive, relief given by the common law courts was a money judgment for damages" and "where damages constitute the sole relief sought, the action is legal in character and there is normally a constitutional right of jury trial." 5 Moore para. 38.19[1], at 166 (footnote omitted).

Not only is the relief sought legal in character but the right asserted falls within the framework of classic common law actions triable to a jury. The holding of *Javins* was briefly summarized at the outset of the opinion, where the court stated "that the warranty of habitability, measured by the standard set out in the Housing Regulations for the District of Columbia, is implied by operation of law in all leases . . . of urban dwelling units covered by those regulations and that

breach of such warranty gives rise to the usual remedies for breach of contract." 138 U.S. App. D.C. at 369, 428 F.2d at 1071.

Where a lease contract or agreement has been violated and one party seeks relief by way of money damages, the mode of enforcement is through common law actions triable to a jury. In medieval times in England, the action for breach of covenant was devised precisely in order to provide the tenant with a remedy in such situations; for example, the tenant might bring an action in covenant for breach of the lessor's implied covenant of quiet enjoyment, and he might recover either damages or possession in such an action. See III W. Holdsworth, *History of English Law* 213 (3d ed. 1927) (hereafter "Holdsworth"); II Pollock & Maitland 216-20; Maitland 47. Covenant is, of course, a common law action triable to a jury. 5 Moore para. 38.11[6], at 120.[44]

At one time the peculiar characteristics of covenant distinguished leases from other forms of contract but over time the differences diminished. I J. Casner, *American Law of Property* §3.11 (1952). Eventually, the most modern of "contract" actions—assumpsit—began to supersede covenant even where leases were involved; by the early eighteenth century, for example, the landlord's right to sue in assumpsit for rent due on a lease for years was established. VII Holdsworth 272. As matters stand today, leases are commonly regarded as bilateral contracts and breach of lease provisions gives rise to a conventional contract action for damages. 3A A. Corbin, *Contracts* §686 (1960). There is no question that such an

[44] The action "is almost always what we should call an action on a lease . . . [T]he action therefore becomes popular as leases for terms of years become common." II Pollock & Maitland 217 (footnote omitted).

action is legal and is subject to the Seventh Amendment.[45]

The lower court sought to escape these implications by emphasizing the role of warranty as underpinning the contractual legal obligation asserted by Pernell against Southall (A. 25-26). Warranties, however, were a familiar and recognized subject of litigation in the common law courts from medieval times onward. W. Prosser, *Torts* §95, at 634 & n. 42 (4th ed. 1971). Initially, warranties were enforced through tort actions, specifically trespass on the case. *E.g., Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Ex. Ch. 1603). During the eighteenth century, assumpsit was invoked to enforce a warranty (*Stuart v. Wilkins*, 1 Doug. 18, 99 Eng. Rep. 15 (K.B. 1778)), and warranty ultimately evolved into its present form in which it is normally enforced through contract actions. Prosser, *supra*, §95, at 635. Trespass on the case, like assumpsit, is triable to a jury. 5 Moore para. 38.11[5], at 120.

There is equally little basis for the lower court's assertion in this case that there is no Seventh Amendment right to jury trial on Pernell's money claims because "an implied warranty of habitability measured by the housing regulations was not an issue tried in any suit at common law in England in 1791" (A. 26). The nature of the basic claim involved here—a claim for damages for breach of an implied contractual obligation—is obviously not changed because the subject of the contractual promise or obligation is modern rather than medieval. Common sense forbids any such argument, and it is inconsistent with numerous decisions of this and other courts.

[45] "An action for damages for breach of contract is legal in nature and triable to a jury." 9 Wright & Miller §2316, at 77-78. *E.g., Simler v. Conner*, 372 U.S. 221 (1963); *Ross v. Bernhard*, *supra*, 396 U.S. at 542.

A vast number of transactions in modern contract and warranty law relate to promises or obligations that could scarcely have been conceived in the eighteenth century or before. Obviously a breach of warranty action relating to an atomic power plant was not "an issue tried in any suit at common law in England in 1791" nor were there suits concerning contracts to deliver transistor radios. Under the Seventh Amendment it is not the subject of the particular contract or obligation that requires a common law counterpart; it is the basic nature of the claim advanced by the litigant which must reflect rights and remedies triable to juries at common law.

The decisions clearly support this view. For example, in *Dairy Queen v. Wood, supra,* the Court held that the Seventh Amendment required a jury trial insofar as the claim there involved was regarded as a contract action to recover damages for breach of a franchise agreement allocating exclusive use of a statutory trademark. 369 U.S. at 477. The Court certainly did not consider it necessary to show that there were contract actions in 1791 in which the substance of the dispute related to franchise agreements allocating statutory trademarks. More broadly, it has been settled doctrine at least since *Parsons v. Bedford, supra,* that not only new issues but new causes of action are subject to the Seventh Amendment where, by historical counterpart or analogy, they more closely resemble common law actions rather than matters falling within the equity or admiralty jurisdictions.

A warranty of habitability is far less a departure from common law principles than a statutory proceeding to recover a penalty for soliciting the immigration of contract laborers into the United States; or a statutory proceeding to obtain reparations for violations of the

Interstate Commerce Act; or a suit to recover special overtime compensation and liquidated damages; or a statutory proceeding by the Government to recover rental overcharges collected in violation of the Emergency Price Control Act. None of these precise subjects was litigated in England in 1791, yet in each of these instances the courts found or assumed that damage actions under these statutes were analogous to traditional common law actions and contemplated that trial by jury was available to the litigants.[46]

Finally, it is of no importance whether Pernell's claims for money damages be viewed as a set off and a counterclaim, as his answer alleged (A. 13), or as recoupment and set off, as the lower court conjectured (A. 25). These terms do not relate to the basic nature of the claims but rather to highly technical and elusive distinctions which determined prior to merger when a defendant might assert a responsive claim in the proceeding. See James §10.14, at 472-74; C. Clark, *Code Pleading* §100, at 633-65 (1947) (hereafter "Clark"). The lower court did not assert these distinctions as a basis for denying trial by jury, so they need not be scrutinized at length.[47]

[46] *Hepner v. United States, supra,* 213 U.S. at 115; *Meeker & Co. v. Lehigh Valley R.R., supra,* 236 U.S. at 430; *Olearchick v. American Steel Foundries, supra,* 73 F. Supp. 273 (W.D. Pa. 1947); *United States v. Jepson*, 90 F. Supp. 983 (D. N.J. 1950). See also authorities cited at p. 20, above.

[47] The court did say in passing, however, that its rules referred to recoupment and set off as "equitable." It is therefore pertinent to note that in fact they are not peculiarly equitable. Recoupment is a long established common law device, historically associated with contract actions tried to juries in the common law courts (James §10.14, at 572-73; Clark §100, at 635); and set off, though first allowed in courts of equity, was permitted in both English and American colonial courts of law well before the adoption of the Seventh Amendment. James §10.14, at 473-74; Loyd, "The Development of Set-Off," 64 *U. Pa. L. Rev.* 541, 551-62 (1916).

B. Practical Considerations Favor the Trial of the Tenant's Money Damage Claims to a Jury.

The factual issues presented by Pernell's affirmative claim for damages—notably, habitability and expenditures—largely coincide with the issues that would be decided in litigating the right to possession. See pp. 32-33, above. In addition, the jury in passing upon the damage claims would presumably calculate the amount owed by the landlord to the tenant in the event that the tenant prevailed; however, even in the absence of affirmative damage claims, it would be proper practice for the jury to make a similar calculation if it found in favor of the landlord.[48]

Thus, for the reasons stated earlier with respect to the right to possession, the claims for money damages are eminently suitable for disposition by a jury. See pp. 31-34, above. However, there is an additional practical reason favoring submission of the damage claims to a jury in the present circumstances. Provision of jury trial will operate to enhance judicial efficiency by encouraging efficient resolution of all relevant claims of both the landlord and the tenant in a single trial by a single factfinder. By contrast, the denial of a jury trial will discourage such efficient resolution and will, in various instances, require fragmentation of factual determinations between judge and jury or even separate trials.

Whatever may be the Seventh Amendment status of Pernell's money damage claims, it is inevitable that claims

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[48] Under District law a judgment for possession based on nonpayment of rent is supposed to reflect the amount of rent found due so that the tenant may pay the money at once and avoid forfeiture. See *Trans-Lux Radio City Corp. v. Service Parking Corp.*, 54 A.2d 144 (D.C. Mun. App. 1947); *Javis v. First National Realty Corp., supra,* 131 U.S. App. D.C. at 381, 428 F.2d at 1083.

will be asserted in eviction proceedings on which jury trials must be afforded. For example, even if this Court sustains the denial of jury trial on Pernell's money damage claims, it may agree that Pernell was entitled to jury trial on Southall's eviction claim.[49] Alternatively, the landlord may assert a money claim against the tenant based on alleged failure to pay rent, a contract claim of the most traditional kind having nothing to do with habitability; or the tenant may assert a counterclaim based on his payment of rent where the landlord's breach is based on explicit lease conditions and not on lack of habitability.[50]

In each of these instances, the right to jury trial would attach at either party's request to the claims in question. Under the priority rule of *Beacon Theatres* and *Dairy Queen*, factual issues common to these claims and to the tenant's money damage claims based on breach of warranty of habitability would also be tried to the jury. See p. 44, above. Severable non-common issues would, however, on the lower court's theory be tried to the court. It is difficult to think of a more complicated or less satisfactory result, yet it would be a direct consequence of denial of jury trial on money damage claims made by the tenant.

This Court has previously emphasized that the use of one factfinder in a single case is highly desirable and, where one or more claims in a proceeding are triable to the jury as of right, it may serve judicial efficiency to

[49] However the implied warranty of habitability may be viewed, the claim of a landlord to repossess rented premises on account of alleged nonpayment of rent is certainly one that was triable to a jury at common law long before 1791.

[50] Both types of claims are expressly permitted in an eviction proceeding in the District. Landlord and Tenant Rule 3 (landlord's rent claim), 5(b) (tenant's counterclaim).

submit to the jury other claims not subject to the Seventh Amendment but arising in the same factual context. *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963). The claims in a District eviction proceeding are, by definition, limited to the landlord's claims for possession, furniture and back rent, and to money damage claims of the tenant based on payment of rent and expenditures claimed as credits against rent. Landlord and Tenant Rules 3, 5(b). Such claims arise out of a common core of facts and will often be closely intertwined. To fragment them in ways that leave some factual issues to the jury and some to the judge merely invites confusion, repetition and even inconsistency, and the practical solution—if practical considerations are given weight—is to submit all of the interrelated factual questions to the jury.

The denial of jury trial on the tenant's money damage claims based on warranty of habitability may, indeed, lead not merely to a prolonged trial but to two trials rather than one. The lower court recognized that there could be money damage claims made in an eviction proceeding triable to a jury as of right (A. 28), and of course Pernell's own claims would be among them if this Court rejects the lower court's view of the warranty of habitability. Therefore, as an alternative ground, the lower court asserted that "if [the tenant] wishes to litigate any counterclaim for damages against a landlord before a jury, he should institute his own action" (A. 28) (footnote omitted).

We discuss at pp. 52-57, below, our contention that this alternative ground for denial of jury trial is not compatible with the Seventh Amendment and finds no sanction in this Court's decision in *Lindsey v. Normet, supra.* What is here relevant, in weighing the practical considerations, is that this course may and in various

instances must result in two trials rather than one; and it can hardly be suggested that this is efficient by any standard. *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329-30 (1971).

The lower court's approach would mean, for example, that a landlord often could not litigate his own claim for past rent due in the eviction proceeding but would have to bring an independent action afterwards.[51] Similarly, a tenant who wished to preserve his right to jury trial on his own money damage claims otherwise triable to a jury would have to defer them to a separate proceeding. Whether or not collateral estoppel operated in the second trial to foreclose relitigation of factual issues litigated in the first, inevitably there would often be some issues which were not common and would have to be litigated in the second case.[52] That second case would be unnecessary if money damage claims were triable before a jury in the eviction proceeding.

C. The Decision of This Court in *Lindsey v. Normet* Did Not Sanction the Denial of Jury on a Tenant's Damage Claims.

While asserting that Pernell's damage claims were not truly legal in character, ultimately the court below

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[51] Landlord and Tenant Rule 3 contemplates that the landlord in such a proceeding may seek a money judgment based on rent in arrears. Assuming the landlord did not request a jury trial, the tenant would certainly be entitled to do so.

[52] When and how collateral estoppel operates in a subsequent action for money damages following an eviction proceeding is an open question in the District at this time as a result of the recent court reorganization. Compare, *e.g.*, *Tutt v. Doby*, *supra*, with the lower court's statement in this case declining to say whether it would follow *Tutt* hereafter (A. 26 n. 22). See generally *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. Ct. App. 1971).

adopted a quite different, alternative ground for its decision to withhold a jury trial on the damage claims, relying on this Court's decision in *Lindsey v. Normet, supra*. *Normet* held that a state could, consistent with due process and equal protection requirements, confine the issues in an eviction proceeding to the tenant's breach of his lease and remit the tenant to an independent action to assert affirmative damage claims of his own. The court below concluded that "in light of this [*Normet*] opinion" there was no constitutional infirmity in requiring a tenant to institute an independent action "if he wishes to litigate any counterclaim for damages against a landlord before a jury . . ." (A. 28).

What the court below seemingly meant is that, because the District of Columbia arguably could have excluded money claims from the eviction proceeding altogether, it was entitled to allow them to be asserted only on *condition* that the tenant surrender his constitutional right to trial by jury where it would otherwise attach. The court below has misunderstood the holding of *Normet*, which did not involve—let alone sanction—any limitation upon trial by jury. See p. 41, above. Unlike the statutory regime adopted by Oregon at issue in *Normet*, the District does not preclude but expressly permits the tenant in a statutory eviction proceeding to assert money claims, based on his rent payments or based on improvements made by him where the landlord has failed to maintain a decent premises.[53] Since the money claims are properly asserted in this case, the only question is

[53] Under the substantive law of Oregon, a landlord's failure to maintain habitable premises was not a defense to an eviction proceeding and the Court specifically contrasted this situation with the substantive law of other states where warranty of habitability is imposed or implied and, if breached, constitutes a defense in an eviction proceeding. 405 U.S. at 609 & n. 15.

whether they are claims of a kind for which the Seventh Amendment guarantees a trial by jury.

The lower court's reliance on *Normet* is additionally infirm because there is no statutory or regulatory basis for concluding that, in order to assert his affirmative damage claims in the course of a statutory eviction proceeding, the tenant is obliged to waive a constitutional right to trial by jury which would otherwise be his. On the contrary, the Superior Court's own civil rules assure litigants that they are entitled to a trial by jury under the Seventh Amendment and the Landlord and Tenant Rules specifically contemplate that trial by jury may be had, where the cause is triable to a jury, in a landlord and tenant proceeding. See p. 7, above.

Any determination that a tenant must waive his right to trial by jury if, but only if, he chooses to assert his damage claims in the statutory eviction proceeding must raise the most serious constitutional objections. Apparently the court below believed that since the District of Columbia did not under the *Normet* decision need to permit the tenant to assert money damage claims in the eviction proceeding, the court could properly require the tenant to waive this constitutional right to trial by jury as the price of asserting the claims. The decisions of this Court establish, however, that a state may not thus penalize or burden the exercise of constitutional rights except, if at all, on the most potent showing of necessity.

In numerous cases, this Court has found that constitutional rights were impermissibly chilled by the burdens or conditions imposed on their exercise, even though in a number of those cases colorable state interests were advanced to justify the limitations.[54] In the

[54] *E.g.*, *United States v. Jackson*, 390 U.S. 570 (1968) (Sixth Amendment right to trial by jury penalized by risk of greater

present case no reasons are or could be provided to explain legitimately why a tenant should be allowed to assert money claims in an eviction proceeding if, but only if, he does not assert his constitutional right to trial by jury. Certainly the lower court's closing reference to desired efficiency in eviction proceedings will not meet this standard (A. 29).

It is highly dubious whether the prospect of a briefer trial where the jury is omitted could ever justify denying a litigant the opportunity for trial by jury. The judgment that any additional time required for jury trial is well spent is embodied in the Seventh Amendment itself. There are, moreover, ways in which a jury trial can be made more efficient without impinging on the right to jury trial itself. For example, the Superior Court's rules already provide for the use of six-man juries (see Civil Rule 38-I) and it would not be difficult to develop brief standard instructions on the issue of habitability. See *Javins v. First National Realty Corp.*, *supra*, 138 U.S. App. D.C. at 380-81, 428 F.2d at 1082-83.[55]

In any event, claims that dispensing with the jury will enhance judicial efficiency, dubious as applied to determining the right to possession, would be extravagant if advanced to explain denial of a jury trial in the eviction

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punishment where jury demanded); *Griffin v. California*, 380 U.S. 609 (1965) (Fifth Amendment privilege against self-incrimination burdened by comment on silence); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (right to vote subject to poll tax); *Sherbert v. Verner*, 374 U.S. 398 (1963) (exercise of religion limited by loss of unemployment compensation); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (First Amendment rights burdened by requiring request for political mail).

[55] The most recent edition of *Standardized Jury Instructions for the District of Columbia* (rev. ed. 1968) presents brief but comprehensive instructions on the existence, nature, exclusion and breach of various implied warranties. *Id.* at 230-34.

proceeding on the tenant's own money damage claims. For, as the court below recognized, the tenant's recourse to preserve his right to jury trial would be to "institute his own action" in the Superior Court independent of the eviction proceeding (A. 28). As a result, there would be two trials rather than one with many of the same issues involved.[56] The rule adopted by the lower court is thus not only at odds with the Seventh Amendment but with the very goal of judicial efficiency asserted by the lower court. See pp. 51-52, above.

Consequently, on any view of the matter there is no substantial state interest to set against the right of the tenant to a jury trial on his claims for money damages in the eviction proceeding; and there is thus no necessity to weigh one against the other in determining whether the court could, given a compelling state interest, require the tenant to waive his right to trial by jury or reserve his damage claims for an independent action. Yet, even if it were assumed that efficiency would be enhanced by such a measure, to accept this justification could not be reconciled with the importance of jury trial in our constitutional heritage. Particularly apt are the words of Blackstone in relation to forms of criminal trial that would circumvent and avoid the right of trial by jury:

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[56] It is hardly tenable to suggest that collateral estoppel based on an eviction could be employed to deny the tenant an opportunity to litigate his damage claims before a jury in a further proceeding. On the assumption that the tenant was otherwise entitled to a jury trial on his money damage claims, the very basis for withholding it in the eviction proceeding would be the supposed opportunity to obtain it in an independent action; and if that opportunity is denied through use of an expanded collateral estoppel doctrine, then the court's own justification for disallowing the jury demand in the eviction proceeding vanishes.

"And however *convenient* these [methods] may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." 4 Bl. Comm. *350.

The forms and means of jury trial may be improved and strengthened within broad limits. This Court has itself given approval to modern rules governing directed verdicts (*Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935)) and to changes in jury composition, including most recently the six-man jury. *Colgrove v. Battin*, ___ U.S. ___ (1973). Jury trial, however, is improved so that it may be preserved, and this Court for over a hundred and fifty years has forbid measures, whether direct or oblique, that would deny jury trial itself in actions at law. See *Scott v. Neely, supra; Dairy Queen v. Wood, supra.*

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

D.C. Code § 16-1501 (Supp. V, 1972) provides:

> "When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia, on complaint under oath verified by the person aggrieved by the detention, or by his agent or attorney having knowledge of the facts, may issue a summons to the party complained of to appear and show cause why judgment should not be given against him for the restitution of possession."

D.C. Code § 16-1502 (1967) provides:

> "The summons provided for by section 16-1501 shall be served seven days, exclusive of Sundays and legal holidays, before the day fixed for the trial of the action. If the defendant has left the District of Columbia, or cannot be found, the summons may be served by delivering a copy thereof to the tenant, or by leaving a copy with some person above the age of sixteen years residing on or in possession of the premises sought to be recovered, and if no one is in actual possession of the premises, or residing thereon, by posting a copy of the summons on the premises where it may be conveniently read."

D.C. Code §16-1503 (1967) provides:

> "When, upon a trial in a proceeding pursuant to this chapter, it appears that the plaintiff is entitled to the possession of the premises, judgment and execution for the possession shall be awarded in his favor, with costs; and if the plaintiff becomes nonsuit or fails to prove his right to the possession, the defendant shall have judgment and execution for his costs."

D.C. Code §16-1504 (1967), repealed by 84 Stat. 560, provided:

> "When, upon a trial in a proceeding pursuant to this chapter, the defendant pleads title to the premises, in himself or in another under whom he claims, setting forth the nature of the title, under oath, and enters into an undertaking, with sufficient surety, to be approved by the court, to pay all intervening damages and costs and reasonable intervening rent for the premises, the court shall certify the proceedings to the United States District Court for the District of Columbia, and the proceeding shall be further continued in the District Court according to its rules."

D.C. Code §16-1505 (Supp. V, 1972) provides:

> "A judgment of the Superior Court of the District of Columbia in a proceeding pursuant to this chapter is not a bar to any afteraction brought by either party, and does not conclude any question of title between them, where title is not pleaded by the defendants."

APPENDIX B

Act of Maryland, 1793, ch. XLIII, reprinted in II W. Kilty, *Laws of Maryland* (1800), provided:

An ACT to provide a summary mode of recovering the poſſeſſion of lands and tenements holden by tenants for years, or at will, after the expiration of their terms. Lib. JG. No. 2. fol. 42.

BE IT ENACTED, *by the General Aſſembly of Maryland*, That in all caſes where lands, tenements or meſſuages, are let or leaſed for one or more years, or at will, and the leſſor or leſſors, their heirs, executors, adminiſtrators or aſſigns, ſhall be deſirous to have again and repoſſeſs the ſaid lands, tenements or meſſuages, after the expiration of the term or eſtate for which they were demiſed, let or leaſed, and for that purpoſe ſhall give notice in writing to the tenant or tenants in poſſeſſion to remove from and quit the ſame, if the ſaid tenant or tenants in poſſeſſion ſhall refuſe to comply therewith within one month after ſuch notice, and upon the end and determination of the ſaid eſtate or eſtates, upon complaint thereof made by the ſaid leſſor or leſſors, his, her or their heirs, executors, adminiſtrators or aſſigns, to any two juſtices of the peace of the county wherein the lands, tenements or meſſuages, are ſituate, and upon due proof made before them, the ſaid juſtices, that the ſaid leſſor or leſſors had been quietly and peaceably poſſeſſed of the lands, tenements or meſſuages, ſo demanded to be delivered up as aforeſaid, that he, ſhe or they, long to poſſeſſed as aforeſaid, let or leaſed as aforeſaid the ſaid lands, tenements or meſſuages, for a term which is now paſſed and expired, and that they have given notice in the manner aforeſaid to the tenant or tenants in poſſeſſion to quit the ſame, and that the ſaid tenant or tenants have refuſed or neglected ſo to do, then and in ſuch caſe it ſhall and may be lawful to and for the ſaid juſtices, and they are hereby authoriſed and required, forthwith to iſſue their warrant, under their hands and ſeals, to the ſheriff of the ſaid county directed, commanding him to ſummon twelve good and lawful men of his bailiwick, to be and appear on the premiſes before the ſaid juſtices, on a day in the ſaid warrant mentioned, which ſhall be the fourth day after iſſuing the ſaid warrant; and alſo at the ſame time to iſſue their ſummons to the tenant or tenants in poſſeſſion, to be ſerved by the ſaid ſheriff, that he, ſhe or they, be and appear on the day and at the place in the ſaid warrant mentioned, to ſhew cauſe, if any he, ſhe or they have, why reſtitution of the poſſeſſion of the ſaid lands, tenements or meſſuages, ſo demiſed, let or leaſed, as aforeſaid, ſhould not be forthwith made to ſuch leſſor or leſſors, his, her or their heirs, executors, adminiſtrators or aſſigns; and if, upon hearing the ſaid parties, or in caſe the ſaid tenant or tenants in poſſeſſion ſhall neglect to appear, after being ſummoned as aforeſaid, proof thereof being made, it ſhall appear in teſtimony to the ſaid jury, and be ſo on their oath by them found, that the ſaid leſſor or leſſors had been in poſſeſſion of the ſaid lands, tenements and meſſuages, as aforeſaid, and that he, ſhe or they, had demiſed, let or leaſed them as aforeſaid, that the ſaid leaſe or eſtate is fully ended and expired, that due notice to quit as aforeſaid had been given to the ſaid tenant or tenants in poſſeſſion, and that he, ſhe or they, refuſed ſo to do, then it ſhall and may be lawful to and for the ſaid juſtices thereupon to award reſtitution of the poſſeſſion of the ſaid lands, tenements and meſſuages, and ſhall forthwith iſſue their warrant, under their hands and ſeals, to the ſheriff directed, commanding him forthwith to deliver to the ſaid leſſor or leſſors, his, her or their heirs, executors, adminiſtrators or aſſigns, the poſſeſſion of the ſaid lands, tenements and meſſuages, in as full and ample a manner as the ſaid leſſor or leſſors were poſſeſſed of the ſame at the time when the ſaid leaſe was made and executed, and the ſaid juſtices, in ſuch caſes, are further authoriſed and required to give judgment for coſts againſt ſuch tenant or tenants ſo holding over as aforeſaid, and thereupon to iſſue forthwith execution, if required by the ſaid leſſor or leſſors, his, her or their heirs or aſſigns; provided nevertheleſs, that if the ſaid tenant in poſſeſſion ſhall allege, that the title of the ſaid lands, tenements and meſſuages, is diſputed and claimed by ſome other perſon or perſons, whom he ſhall name, in virtue of a right or title accrued or happening ſince the commencement of ſaid leaſe, by deſcent, deed, or under the laſt will and teſtament of the ſaid leſſor or leſſors, and if thereupon the perſon ſo claiming as aforeſaid ſhall forthwith appear, or upon a ſummons, immediately to be iſſued by ſaid juſtices, and returnable in ſix days next following, ſhall appear before ſaid juſtices, and ſhall, on oath or affirmation, by the ſaid juſtices to be adminiſtered, declare, that he verily believes that he is entitled in manner aforeſaid to the ſaid lands, tenements and meſſuages, in queſtion, and ſhall, with two ſufficient ſureties, enter into bond to the leſſor or leſſors, his, her or their heirs or aſſigns, in ſuch ſum as the ſaid juſtices ſhall think proper, not leſs than three hundred pounds, to proſecute his, her or their claims at the next county court which ſhall be held in and for ſaid county thereafter, that then, and not otherwiſe, the ſaid juſtices ſhall forbear to award reſtitution of the poſſeſſion as aforeſaid, and ceaſe to give judgment for the coſts as aforeſaid; provided alſo, that if the ſaid claim ſhall not be proſecuted as aforeſaid, that the ſaid juſtices ſhall proceed to award reſtitution of the poſſeſſion as aforeſaid, and iſſue their warrant as aforeſaid, and give judgement and iſſue execution for the coſts as aforeſaid, within ten days after the end of ſaid court, in the ſame manner as herein before enjoined and directed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-6041

DAVE PERNELL, *Petitioner,*

v.

SOUTHALL REALTY, *Respondent.*

On Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR AMICUS CURIAE APARTMENT HOUSE COUNCIL OF METROPOLITAN WASHINGTON, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

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BRIEF FOR AMICUS CURIAE APARTMENT HOUSE COUNCIL OF METROPOLITAN WASHINGTON, INC.

INTRODUCTION

In the instant case, this Court is called upon to resolve a significant question in the procedures under the District of Columbia's landlord-tenant law, in particular, whether a trial by jury is constitutionally required for a summary possessory action of the kind recently before the Court in *Lindsey* v. *Normet,* 405

U.S. 56 (1972). This brief is filed by the Apartment House Council of Metropolitan Washington, Inc. (hereinafter the "Council") as *amicus curiae*. The Council is a non-profit corporation organized under the laws of the District of Columbia. Its 125 regular members own or manage some 200,000 apartment units in the District of Columbia and surrounding suburban areas of Northern Virginia and Maryland. The Council is concerned that procedural complications in the summary proceeding may tend to delay the speedy adjudication designed to prevent both undeserved economic loss to landlords and unmerited harassment and dispossession of tenants. Both parties have consented to the filing of this brief and the consents were filed with the Court on or about June 6, 1973.

STATEMENT OF QUESTION PRESENTED

Whether, in a statutory summary eviction proceeding in the District of Columbia,[1] the seventh amendment guarantees a trial by jury on either the landlord's claim or on the tenant's affirmative defenses and counterclaims.

STATEMENT OF THE CASE

On July 20, 1971, respondent Southall Realty commenced an action in the Landlord & Tenant Branch of the Superior Court of the District of Columbia pursuant to D.C. Code § 16-1501 (Supp. V 1972) to regain possession of premises leased to petitioner, Dave Pernell, under a written lease agreement dated

[1] The resolution of the issues presented concerns solely the procedure in the Superior Court of the District of Columbia since this Court has long recognized that the seventh amendment is inapplicable to proceedings in state courts. *See, e.g., Walker* v. *Sauvinet*, 92 U.S. 90, 92-93 (1876).

May 10, 1971 (A.6).[2] Although the complaint alleged as grounds for the action Pernell's default of $375.00 in three months' rent, the complaint made no demand for rent in arrears or distress on personalty (A.7). On the return day, August 9, 1971, Pernell filed a verified answer denying that any rent was owed or that a notice to quit had been served or validly waived (A. 11). Moreover, Pernell contended that the premises had been maintained in an uninhabitable condition and in violation of the District of Columbia Housing Regulations, and that Southall had breached its agreement to credit repairs made by Pernell against his rent (A.11). Pernell further asserted a set-off in the amount of $389.60 for repairs made to bring the premises into partial compliance with the housing code and a counterclaim in the amount of $75.00 for rent already paid while the premises were maintained in violation of the housing regulations (A.13). A jury trial was demanded in the answer (A.12), and the necessary fees were paid (R. 172).[3]

On the day Pernell filed his answer and appeared with counsel, Judge Joseph M. F. Ryan, Jr., *sua sponte* struck the jury demand and continued the case one week, to August 16, 1971, for trial (A.1). Pernell's counsel appeared on the continued date without his client and the case was called for trial (R.61). Counsel stated that he had expected to argue the propriety of the court's striking of the jury demand and requested a further continuance to secure

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[2] Citations to "A —" are to the printed appendix filed in this Court by petitioner on August 6, 1973.

[3] Citations to "R —" are to the record transmitted to this Court by the court below.

Pernell's presence (R. 61). The request was denied (R.61).

The sole witness at the ensuing trial was Southall's agent, who authenticated the lease agreement and testified that no rent had been paid and that Pernell had not completed the agreed repairs. At the conclusion of the direct and cross-examination of the witness, Judge Ryan found for Southall and, on August 20, 1971, entered judgment, for Southall for possession and costs, issuing a writ of restitution (A.1).

Pernell filed a notice of appeal on August 25, 1971 (A.1). The case was argued before the District of Columbia Court of Appeals on May 10, 1972 (A.5). That court on May 10, 1972 remanded the record to the trial court for supplementation on the issue of whether the jury fee had been paid (R. 162). Following a hearing on May 16, 1972, the record was supplemented to reflect the trial court's finding that the fee had been paid and the supplemental record ordered transmitted to the Court of Appeals (A.3). In an opinion reported at 294 A.2d 490, the Court of Appeals on August 31, 1972, rejecting Pernell's contention that he was unconstitutionally deprived of his right to a jury trial, affirmed the decision of the trial court (A.14). Pernell filed a petition for a writ of certiorari on January 13, 1973 which was granted by this Court on April 2, 1973 (A.32).

SUMMARY OF ARGUMENT

The seventh amendment creates no new rights to a trial by jury; it merely preserves those rights, in suits at common law, as they existed at the time the amendment was adopted. The landlord's claim asserted

in the District of Columbia's statutory summary eviction proceedings was not one which would have been tried to a jury under the English common-law prevailing when the seventh amendment was adopted. The claim's closest historical counterpart was not triable to a jury. The statutory summary eviction proceeding derives from actions historically tried before special commissioners or referees presided over by one or more justices of the peace, and did not proceed according to the course of the common law. The tenant's affirmative defenses and claims asserted in the proceeding are wholly equitable in nature; legal claims can be asserted only in a separate action initiated by the tenant.

ARGUMENT

The statute under which Southall proceeded, D. C. Code § 16-1501 (Supp. V 1972), provides:

> "When a person detains possession of real property without right, or after his right to possession has ceased, the Superior Court of the District of Columbia, on complaint under oath verified by the person aggrieved by the detention, or by his agent or attorney having knowledge of the facts, may issue a summons to the party complained of to appear and show cause why judgment should not be given for the restitution of possession."

No mode of trial for such actions is prescribed and the issues presented in the instant case result from the enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 90-358, 84 Stat. 473 (hereinafter referred to as "Court Reform Act"), which became effective February 1, 1971.

Prior to the effective date of the Court Reform Act, the United States District Court for the District of Columbia was the trial court of general jurisdiction in the District. *See* D.C. Code §§11-521, et seq. (1967). The District of Columbia Court of General Sessions exercised concurrent civil jurisdiction where the amount in controversy did not exceed $10,000, *see* D. C. Code §11-961 (1967), was specifically empowered to try proceedings under D. C. Code §16-1501, and had no jurisdiction over cases involving title to real property except as part of a divorce action, *see* D. C. Code § 11-1141 (1967). The Court Reform Act substantially reorganized the court system within the District of Columbia. After a thirty-month transition period, the United States District Court for the District of Columbia had civil jurisdiction essentially identical to that of any United States District Court, *see* D. C. Code §11-501 (Supp. V 1972), and the newly created successor court to the Court of General Sessions, the Superior Court of the District of Columbia, became the court of general original jurisdiction, *see* D. C. Code §11-921 (Supp, V 1972). The Court Reform Act, §142(5)(A), 84 Stat. 552 also repealed, for reasons which are disputed,[4] D. C. Code §13-702 (1967),

[4] The committee report on the House version stated that the D. C. Code chapter containing § 13-702 (1967) was "superfluous in light of constitutional jury trial requirements . . . ." *See* H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 164 (1970). On the other hand, the Senate version retained the provisions of § 13-702 "so as to assure the constitutionality of the provisions regarding *small claims.*" *See* S. Rep. No. 91-405, 91st Cong., 1st Sess. 35 (1969) (emphasis supplied). However, although the legislative history of the Court Reform Act would be relevant to the statutory construction of the Act, it is of little moment in the instant case since Congress unquestionably repealed the statutory jury trial right. If Congress determines that the repeal was unintentional or unwise, Congress can easily restore the statutory right.

which had provided that "[w]hen the amount in controversy in a civil action pending in the District of Columbia Court of General Sessions exceeds $20, and in all actions for the recovery of possession of real property either party shall be entitled to a trial by jury. . . ."[5]

In *Capitol Traction Co.* v. *Hof,* 174 U.S. 1, 5 (1899), this Court squarely held that the seventh amendment applies to civil actions in the District of Columbia. That amendment provides that:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const., amend. VII.

It is well settled that the seventh amendment creates no new rights to trial by jury, it merely preserves those rights as existed at the time the Constitution was adopted, "[i]n suits at common law." *See Parsons* v. *Bedford,* 28 U.S. (3 Pet.) 433, 446-47 (1830).

There are several well established principles governing resolution of civil jury trial questions. Pernell's fundamental disagreement with the Court of Appeals decision is not with the formulation of these principles, but with their application. As framed by the court below the inquiry was "whether this action or its equivalent existed at common law in England in 1791." *See* 294 A.2d at 492. As summarized in pages

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[5] The constitutional question presented herein was left undecided in light of the statutory right to a trial by jury given in the predecessor to § 13-702. *See Kass* v. *Baskin,* 82 U.S. App. D.C. 385, 386 n. 4, 164 F.2d 513, 514 n. 4 (1967).

13 and 14 of his printed Brief, the tenant argues that the inquiry is whether the claim asserted by the landlord is one "that would be tried to a jury under the English common law prevailing when the Seventh Amendment was adopted" and whether the claim "finds its closest historical counterpart in claims triable to a jury at common law or falls under a different head of jurisdiction — such as equity — where a jury trial was not available." The historical basis of D. C. Code §16-1501 (Supp. V 1972) is thus the starting point of discussion.

In the Organic Act of 1801, ch. 15, §1, 2 Stat. 104, Congress adopted for the newly created District of Columbia the laws then in force and effect in Maryland. Among these was the predecessor of the summary eviction statute, "An Act to provide a summary mode of recovering the possession of lands and tenaments holden by tenants for years, or at will, after the expiration of their terms." Act of 1793, ch. XLIII, II W. Kilty, Laws of Maryland (1800). This statute, reprinted in full at page 1b of petitioner's printed Brief, provided a summary proceeding where a tenancy for years or at will had been terminated and the tenant had refused to comply with the landlord's written notice to quit. *See id.* Upon complaint and proof to two justices of the peace of the county, the justices were "required forthwith to issue their warrant . . . commanding [the sherrif] to summon twelve good and lawful men of his said county, to be and appear on the premises before the said justices [within four days] . . . and their summons to the tenant [to] appear and . . . show cause . . . why restitution of the possession of said lands . . . should not be forthwith made to such lessor. . . ." If, after proof,

the "jury"[6] found that the landlord was entitled to possession by reason of the termination of the tenancy and notice to quit, the justices were to award restitution of the possession of the lands to the lessor. *See id.* This expedited procedure was not followed, however, where the tenant disputed the lessor's title; in such cases, the tenant was, after posting a bond, to prosecute his claim under the disputed title "at the next county court." *See id.*

Proceedings under the Maryland Act continued until Congress enacted a general revision of landlord and tenant law in the Act of July 4, 1864, ch. 243, 13 Stat. 383. The Act departed from the Maryland practice by making the proceeding available, without regard to the existence of a lease, to wrongful holdings obtained by forcible entry or maintained by forcible detainer, and by giving either party the right of appeal from the justice of the peace court and trial *de novo,* with the right to a jury, before the Supreme Court of the District of Columbia. *See* 13 Stat. 383-84. The preclusion of the remedy to a landlord whose title was disputed was maintained, section 3 of the Act providing that on posting of a bond by the tenant, the case was "certified" to the Supreme Court of the District of Columbia.[7]

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[6] As demonstrated at pages 12-14, infra, the "twelve good and lawful men" called for in the statute did not constitute a "jury" as that term was contemplated in the seventh amendment.

[7] The distinct procedure to be followed where title was disputed has been carried to the present day. D. C. Code § 16-1504 (1967), *repealed,* Court Reform Act, § 145(g)(2), 84 Stat. 560, provided in such cases for the posting of a bond and certification of the case to the United States District Court for the District of Columbia. An essentially identical scheme for certification to the Superior Court's Civil Division is now provided by local rule. See Rule 5(c), Superior Court Rules—Landlord and Tenant.

Following this Court's limitation of the Act, in *Willis* v. *Eastern Trust & Banking Co.*, 169 U.S. 295 (1898), to the conventional relation of landlord and tenant unless forcible entry or detainer was involved. Congress made the procedure available to possessory disputes arising out of mortgages. *See* Act of March 3, 1901, ch. 854, 31 Stat. 1193. Simultaneously, jury trials were abolished in the justice of the peace court and were retained in *de novo* appeals to the District's Supreme Court. *See* 31 Stat. 1191, 1201. Subsequently the justice of the peace court was replaced by the Municipal Court, *See* Act of February 17, 1909, ch. 134, § 1, 35 Stat. 623, and the Municipal Court was made a court of record with the power to conduct jury trials, *see* Act of March 3, 1921, ch. 125, §§ 2, 3, 41 Stat. 1310. The *de novo* appeal procedure was simultaneously abolished. *See id.*, § 12, 41 Stat. 1312. The availability of the statutory eviction proceeding was extended to its present scope, any situation where property was detained without right or after right to possession had ceased, in 1953. *See* Act of June 18, 1953, Pub. L. No. 83-71, 67 Stat. 66.

Returning from the present to the English antecedents of the Maryland statute of 1793 from which D.C. Code §§ 16-1501, *et seq.* (Supp. V 1972) are derived, the historical materials were summarized in *Urciolo* v. *Evans*, L & T No. 60495-71, reported in part, 99 Daily Wash. L. Rep. 1729 (Super. Ct. 1971). *Urciolo* is reproduced in full in the Petition for Writ of Certiorari at 19a-44a. In summary, *Urciolo* recognized several likely historical counterparts of the statutory eviction proceeding—the action of ejectment, the writ of assize of novel disseisin, and the writ of entry. *See* Petition for Writ of Certiorari at 22a.

After a scholarly analysis of these counterparts, the court in *Urciolo* concluded that the "imprint of assize [on the Maryland statute] is extraordinary." *See id.* at 31a. It is in this historical context that we turn to consideration of the issue presented.

What then is the nature of the summary eviction statute under which the procedure before the trial court has long been recognized as "not according to the course of the common law?" *See Harris* v. *Barber,* 129 U.S. 366, 369 (1889). "Statutes relative to actions of summary process for the recovery of possession by a landlord confer new rights and prescribe a remedy by a course of proceeding unknown to the common law." 3A Thompson, Real Property, § 1370 at p. 718 (1959 Repl. Vol.). Courts act in such proceedings, not under their general common law jurisdiction, but solely pursuant to the statutory grant of authority. *See Townsend* v. *Brooks,* 5 Cal. 52, 53 (1855); *Chicago* v. *Chicago S.S. Lines, Inc.,* 328 Ill. 309, 315, 159 N.E. 301, 303 (1927). In fact such proceedings are in derogation of the common law. While "[a]t common law, one with the right to possession could bring an action for ejectment, a 'relatively slow, fairly complex, and substantially expensive procedure,'" the common law also recognized the landlord's right to self help. *See Lindsey* v. *Normet,* 405 U.S. 56, 71 (1972). Summary eviction procedures were enacted "to alter the common law and obviate resort to self-help and violence." *Id.* Petitioner, in pages 17-18 of his printed Brief, attempts to fit the proceedings below into Mr. Justice Story's classic seventh amendment mold—

> "'By common law [the framers of the Constitution] meant . . . not merely suits, which the common law recognized among its old and settled pro-

> ceedings, but suits in which legal rights were to be ascertained and determined . . . . [*Parsons* v. Bedford,] 28 U.S. (Pet.) [433,] 447 [(1830)]."

However, Mr. Justice Story noted in the same paragraph that "[p]robably there were few, if any states in the Union, in which some new legal remedies, differing from the old common law forms, were not in use, but in which, however, the trial by jury intervened, and the general regulations in other respects *were according to the course of the common law.*" *Id.* (emphasis supplied). Accordingly, it is difficult to accept petitioner's contention that actions *not* in accordance with the course of the common law were within the contemplation of the framers as common law actions to which the seventh amendment applied. *Cf.*, *Waring* v. *Clarke*, 46 U.S. (5 How.) 441, 459 (1847).

Perhaps the greatest conceptual difficulty in the consideration of the nature of the summary action which originated with the Maryland statute is that statute's appellation "jury" applied to the "twelve good and lawful men" to be summoned by the sheriff. A "jury," within the meaning of the seventh amendment, does not necessarily mean a deliberative body of twelve men, *see Colgrove* v. *Battin*, 411 U.S. — (1973); neither, it will be demonstrated, is a deliberative body of twelve necessarily a "jury," as that term was understood by the framers. The Pennsylvania counterpart to the Maryland statute was enacted in 1772 and similarly called upon the sheriff to summon twelve freeholders to determine the issues. *See Kinley* v. *McFillen*, 6 Phila. 35 (Com. Pl. 1865). In rejecting a challenge, under the state constitutional provisions corresponding to the seventh amendment, to the trial of the case without a jury, the court stated that "[i]t is

assuming too much when it is taken for granted that in all cases in which the legislature provides for the ascertainment of specific facts or issues by twelve men, that the proceedings before them constitute a *trial* by jury." *Id.* The Maryland Statute, like the Pennsylvania statute considered in Kinley, commands the summoning of exactly twelve men without provisions for selection of a smaller panel from the twelve or for challenges for cause. Compare Act of Maryland of 1793, ch. XLIII, II W. Kilty, Laws of Maryland (1800) *with Kinley, supra.* In considering a similar challenge to South Carolina's summary eviction procedures, the Supreme Court of that state recognized that the proceedings before twelve freeholders in the presence of magistrates was one before a "special tribunal for exceptional cases" rather than a trial by jury which the state constitution preserved inviolate. *See Frazee* v. *Beattie,* 26 S.C. 348, 352, 2 S.E. 125 (1886). The members of panel under the similar Delaware statutory scheme are referred to as "referees." *See Crow* v. *Cann,* 43 Atl. 839, 840 (Del. Super, 1899). Summary eviction statutes not providing for trial by jury have withstood attack under state constitutional provisions. *See Peasant* v. *Heartt,* 22 La. Ann. 292 (1870); *Missouri ex rel. Kansas City Auditorium Co.* v. *Allen,* 45 Mo. App. 551 (1891); *Reece* v. *Montano,* 48 N.M. 1, 144 P. 2d 461 (1943); *Wilder* v. *Kneeland,* 94 N.H. 185, 49 A. 2d 506 (1946).

More important is this Court's recognition of the nature of a so-called "trial by jury" before a justice of the peace. In *Capitol Traction Co.* v. *Hof,* 174 U.S. 1 (1899), the seventh amendment's prohibition against the "re-examination" of any "fact tried by a jury" was considered. *Hof* commenced a negligence action

against the Traction Company seeking damages of $300;[8] in the justice of the peace courts a jury trial was demanded. *See id.* at 2-3. The question presented to the Court was whether, where trial by jury was initially had before the justice of the peace, a jury trial *de novo* on appeal in the District's Supreme Court was a reexamination of facts tried by a jury before the justice of the peace and hence prohibited by the seventh amendment. The Court, after extensive historical analysis, answered the question in the negative. *See id.* at 45. The basis of the Court's holding was its determination that the proceedings before the justice of the peace did not amount to a "trial by jury", as that term was used in the seventh amendment. *See id.* at 18. It was recognized that Congress could provide for trials before the justice of the peace, to be decided by any specified number of persons in his presence, "[b]ut such persons, even if required to be twelve in number, and called a jury, were rather in the nature of special commissioners or referees." *Id.* at 38. Accordingly, *Hof,* sustains the validity of the Court of Appeals view that the Maryland statute provided no right of trial by jury to be preserved by the seventh amendment. The origin of the right to jury trial in summary eviction proceedings was thus solely statutory; Congress, having given the right in the 1864 amendments, see p. —, *supra,* is free to take it away and has done so.

The determination that the claim asserted was not triable to a jury under the practice of 1790 does not, however, end the inquiry, for where a new cause of

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[8] The action was thus unquestionably one at common law where the amount in controversy exceeded $20.

action is created by Congress, the constitutional jury trial question is to be resolved by fitting the cause into its nearest historical analogy. *See Luria* v. *United States,* 231 U.S. 9, 27-28 (1913). As noted on p. — *supra,* the possible historical analogs are the action for ejectment, writ of assize of novel disseisin, and writ of entry.

The Court of Appeals rejected the action in ejectment as the appropriate historical analog on two grounds—the presence of the considerably more cumbersome and limited action for ejectment in another section of the code, D.C. Code § 16-1124 (1967), and the fact that the question of title was always present in actions for ejectment.[9] *See* 294 A.2d at 492-93. As Mr. Justice Story observed, the "professed object [of the action of ejectment] is to try the titles of the parties." *See McArthur* v. *Porter,* 31 U.S. (6 Pet.) 205, 211 (1832). Accordingly, although this court has stated that "the Seventh Amendment, for example, entitled the parties to a jury trial in actions . . . for recovery of land . . . ," *see Ross* v. *Bernhard,* 396 U.S. 531, 533 (1970), the cases to which the Court referred were actions in ejectment involving title. Actions for recovery of land are to be distinguished from actions for recovery of *possession* of land. This Court has consistently recognized this distinction, "one of the most universal and best known distinctions of the common law." *See Grant Timber & Mfg. Co.* v. *Gray,* 236 U.S. 133, 134 (1915). Claims of ultimate right are properly excluded from possessory actions. *See Bianchi* v. *Morales,* 262 U.S. 170, 171 (1932). *Accord,*

[9] The unavailability of the summary procedure where the tenant disputed title has been an integral part of the statute from 1793 to the present. *See* pp. —, —, *supra.*

Frazee v. *Beattie,* 26 S.C. 348, 351-52, 2 S.E. 125, 127 (1886).

The fact that the landlord in the District of Columbia can pursue the ejectment remedy of D.C. Code §16-1124 (1967) against a defaulting tenant does not convert the summary eviction statute to ejectment's equivalent for seventh amendment purposes. *In Cameron* v. *United States,* 148 U.S. 301 (1893), this Court considered a statutory summary proceeding for the removal of unlawful enclosures of public lands.[10] The government's contention that the proceeding was in the nature of a common law action was rejected. *See* 148 U. S. at 304. Noting that the common law remedies of ejectment or trespass were available to the government, the Court nonetheless held that the "proceeding contemplated by this Act is more nearly analogous to the summary remedies provided for the enforcement of mechanic's liens considered by this Court in *Idaho & O. Land Imp. Co.* v. *Bradbury,* 132 U.S. 509 [(1889)]." *See id.* at 305. *Bradbury* further recognized that an advisory jury employed by the judge in an equity proceeding does not transform the action to one at common law. *See* 132 U.S. at 514.

The Court of Appeals found the closest historical analog to be the writ of assize of novel disseisin. *See* 294 A.2d at 494. This view is supported by the decisions of this Court, *see Lindsey* v. *Normet,* 405 U.S. 56, 68 n. 14(1972), and is not seriously questioned by petitioner. However, petitioner mis-

[10] By the Act of February 25, 1885, ch. 149, § 1, 23 Stat. 321, Congress declared unlawful the enclosure of public lands by any person without good faith claim or color of title to the land. Section 2 of the Act authorized the proper territorial district court to order the summary destruction of the enclosure. *See* 23 Stat. 32.

apprehends the effect of that writ's provisions, asserting that "the use of the jury was obligatory." *See* Brief at 27 n.3, and accompanying text. While the writ unquestionably directs the sheriff to summon "twelve free and lawful men . . . to view th[e] tenament," *see id.*, as demonstrated in pp. 12-14, *supra*, the body thus summoned was in the nature of a special commission or panel of referees, rather than a "jury" as that term was known to the common law.

The tenant further asserts that apart from any right to trial by jury on the landlord's claim, he has a right to a jury trial on the issues raised in his setoff and counterclaim. Primary reliance is placed on this Court's decisions in *Dairy Queen Inc.* v. *Wood*, 369 U. S. 469 (1962), and *Beacon Theaters, Inc.* v. *Westover*, 359 U. S. 500 (1959). Resolution of the issue raised thus turns on analysis of petitioner's claim asserted in the trial court.

The issues litigable by a tenant in summary eviction proceedings vary widely in the jurisdictions across the nation. *See Lindsey* v. *Normet*, 405 U.S. 56, 60-61 (1972). While no denial of due process flows from the relegation of claims of ultimate right and defenses sought to be raised in possessory actions, *see id.* at 67-68, the procedures in the District of Columbia have evolved in modern times to considerably broaden the scope of litigable issues; this evolution has been judicial rather than legislative. A tenant can obtain equitable relief to avoid eviction by payment of rent found in arrears. *See Molyneaux* v. *Town House, Inc.*, 1195 A.2d 744, 746-47 (D. C. Ct. App. 1963). Moreover, the common law wall which had shielded the landlord from an obligation to maintain the leased premises was breached by the court in *Brown* v.

Southall Realty, 237 A.2d 834 (D. C. Ct. App. 1968), where the court held that the landlords knowing failure to maintain habitable premises in substantial compliance with the District's Housing Regulations at the time the lease was executed rendered the lease void and unenforceable.

The wall was virtually swept away by the subsequent decision in *Javins* v. *First National Realty Corp.,* 138 U. S. App. D. C. 369, 375, 428 F.2d 1071, 1077 *cert. denied,* 400 U. S. 925 (1970), which held that a warranty of habitability and substantial compliance with the regulations would be an implied covenant of every lease of real property located within the District of Columbia. As a consequence of warranty thus judicially implied, where the tenant proved that the landlord's total breach of the warranty extinguished the entire rental obligation, judgment would be for the tenant; on the other hand, if the tenant demonstrates that the rental obligation has been suspended merely in part or fails to show any breach, judgment for possession would issue subject to the equitable relief under *Molyneaux, supra,* upon payment of the rent in arrears diminished by the rent abated by partial breach. *See Javins* at 370-71, 428 F.2d at 1082-83. Thus, as the Court of Appeals noted, the setoff and counterclaim asserted were properly considered as equitable defenses of recoupment and setoff, respectively. *See* 294 A.2d at 496. Pernell correctly makes no claim that the seventh amendment secures a right to trial by jury for issues raised in equitable claims or defenses. Petitioner's principal attack on this branch of the Court of Appeals decision is by the assertion that the defense contem-

plated by *Javins, supra,* raises issues[11] which are manifestly legal. *See* Brief at pp. 44-46. However, the *Javins* court, in treating the question before it in the conventional terms of contract and warranty, did not speak in the seventh amendment context. The court clearly indicated that it was rejecting the rigid construction of leases which traditionally prevailed at common law, thereby establishing a common law, (as distinguished from statutory law) of the District of Columbia in 1970 radically different from "the common law" of England and the states in 1791. *See Javins* at 375, 428 F.2d at 1077.

> "The doctrine that when classification is necessary, a court should look to the historical basis of the plaintiff's right under the English law in the light of such modifications as have taken place in this country, is not always an accurate one. The equitable characteristics of the relief sought must be considered, for the courts of chancery have always claimed and exercised the right to provide a remedy for every wrong not cognizable by courts of law, and the *complexities of the present social order have brought about conditions which were unknown when the English courts of Equity were established." DeGarmo* v. *Goldman,* 19 Cal. 2d. 755, 759, 123 P.2d 1, 3 (1942) (emphasis supplied).

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[11] The characterization of the issues raised in the tenant's defenses and counterclaims is somewhat simplistic for "issues are not inherently legal or equitable. They are like chameleons which take their color from their surrounding circumstances." James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 692 (1963). For example, the conventional contact issues of consideration, agreement, breach, etc., are "legal" in the context of an action for damages yet "equitable" in the context of an action for specific performance.

It is precisely in this context that the *Javins* court provided the remedy for a wrong not cognizable at common law. *See Javins* at 375, 428 F.2d at 1077. Since the habitability defense was judicially created, it can be judicially limited in the manner of its exercise, as was done by the Court of Appeals here. *See* 294 A.2d at 498. It is clear that due process is not offended by limitation of the *Javins* defense to diminish rent in arrears and relegation of affirmative claims to separate actions. *See Lindsey* v. *Normet,* 405 U.S. 46, 68 (1972).

Petitioner's reliance on *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962), and *Beacon Theaters, Inc.* v. *Westover,* 359 U. S. 500 (1959), is misplaced as those cases concerned the protection of seventh amendment rights through the priority of issue determinations common to legal and equitable claims litigated in the *same* proceeding. These concerns come into play only if the court's finding as to the amount of rent in arrears is conclusive at the subsequent action brought by the tenant. The Court of Appeals expressly left that question open, 294 A.2d at 497 n. 22, and its resolution should appropriately await an actual controversy raising that issue.[12] *See* U. S. Const., Art. II, §2.

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[12] It is clear however, that if this Court rules in petitioner's favor, the question left open by the Court of Appeals would be answered in the affirmative since the finding could not be reexamined in any court. *See* U. S. Const., amend. VII; *Capitol Traction Co.* v. *Hof,* 174 U. S. 1 (1899).

CONCLUSION

It is accordingly urged that the decision of the District of Columbia Court of Appeals was correct and should be sustained.

Respectfully submitted,

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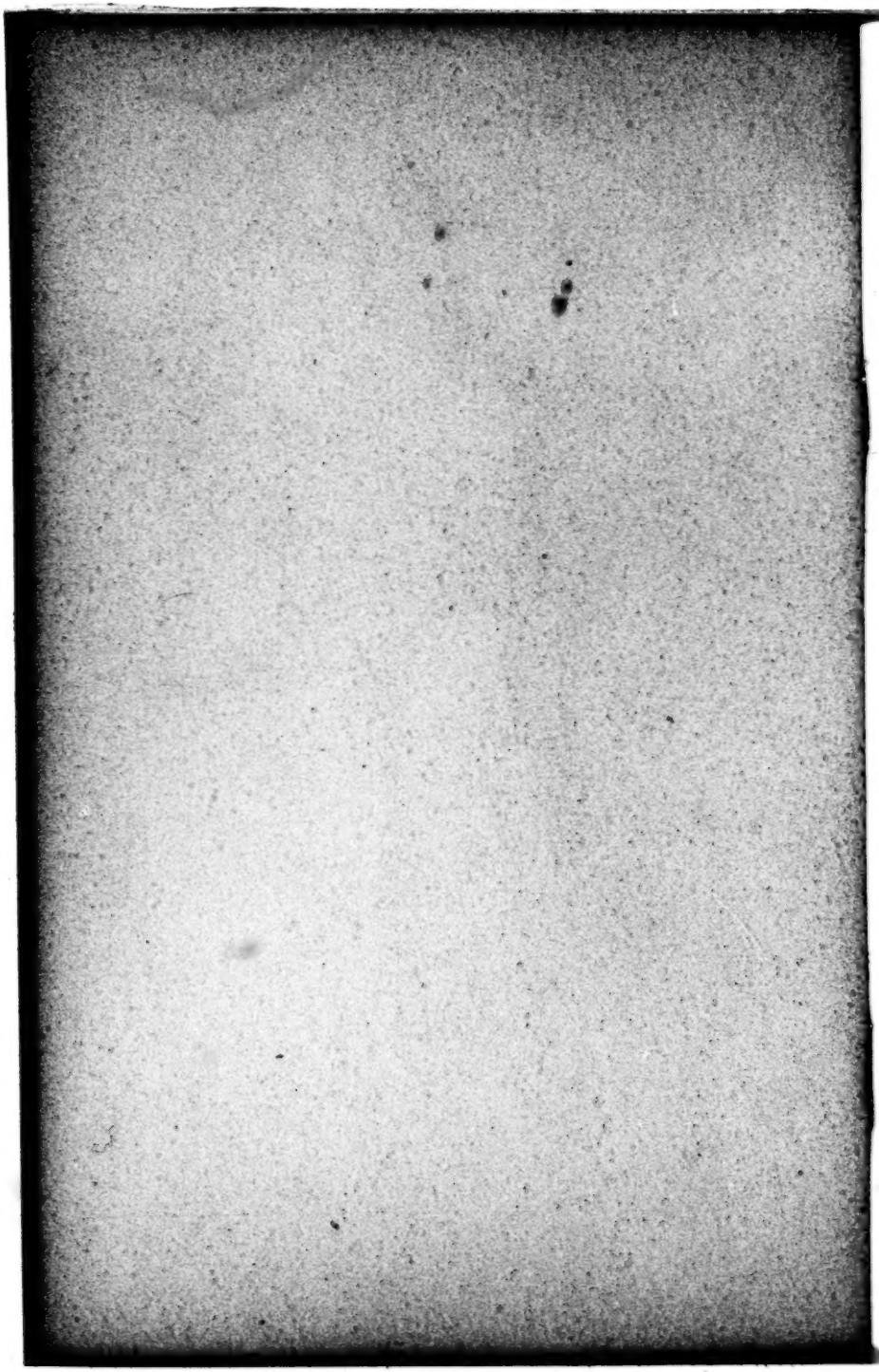

No. 72-6041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

DAVE PERNELL,

Petitioner,

v.

SOUTHALL REALTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR RESPONDENT SOUTHALL REALTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINION BELOW

Petitioner's recital is correct.

JURISDICTION

Adopted

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Adopted

QUESTIONS PRESENTED

Adopted

STATEMENT OF THE CASE

Adopted, except for the assertion that the legislative history reveals that Congress deemed the statutory guarantee to trial by jury superfluous in the light of Constitutional requirements.

SUMMARY OF ARGUMENT

Historical analysis discloses that the forcible entry and detainer statute in the D. C. Code, Chap. 15, 16-1501 (Sup. V 1972) is most closely analogous to the common law statute of forcible entry and detainer more particularly 8 Hen. VI c. 9 (1429). Under that statute actions were tried by jury before a justice of the peace. No right of appeal was permitted. Since a justice of the peace is not a judge, trial before him with jury is not trial by jury in the sense of the common rule of the Constitution. *Capital Traction v. Hof*, 174 U.S. 1 (1899). Therefore a trial pursuant to D. C. Code 16-1501 does not mandate trial by jury.

The fact that juries have decided landlord and tenant actions in the District of Columbia is based on neither Constitutional dictates nor Congressional design. Under the Organic Act of 1801, the District of Columbia inherited the Maryland practice of trying landlord and tenant disputes before a justice of the peace and jury with no right of appeal. This was the same mode of trial which had prevailed in England.

D. C. Code 16-1501 provides a speedy summary proceeding whereby the landlord may recover possession of his property for non-payment of rent as soon as his right accrues. The summary nature of such legal process has been consistently maintained in the English statutes of forcible entry and detainer, and in all the District of Columbia laws concerning landlord and tenant eviction

proceedings including the Maryland law adopted in 1801. It is a confirmation of the protection under law of citizens' property rights.

Federal and District of Columbia courts have consistently ruled that a tenant may defend in an action his landlord brings for repossession for non-payment of rent only by way of equitable relief. This is also the law in California and New York. To permit the tenant to claim a money judgment i.e. defense by a legal claim as Landlord and Tenant Rule 5(b) seems to suggest is not only contrary to the well settled rule in the District of Columbia but also destroys the summary nature of the possessory action. Such destruction compels the landlord to maintain a tenant in possession while the tenant's legal claim is adjudicated. For the law to force a landlord to keep on the premises one who declines to pay rent and who intends to vacate such premises only after his legal claim has been adjudged, is violative of the landlord's rights under the Due Process clause of the Constitution.

ARGUMENT

I.

THE SEVENTH AMENDMENT DOES NOT GUARANTEE A TENANT A RIGHT TO TRIAL BY JURY WHEN THE LANDLORD SEEKS REPOSSESSION OF HIS PROPERTY FOR NON-PAYMENT OF RENT.

A. Trial by Jury Within the Meaning of the Seventh Amendment as Viewed in the Context of the Common Law is a Trial by a Jury in a Court Controlled Only by a Judge.

In construing the Seventh Amendment providing for the preservation of trial by jury in suits at common law the principle of construction adopted by this Court has been to examine the right of trial by jury as it existed under English Common law when the Seventh Amendment was adopted in 1791. *Parsons v. Bedford* 28 U.S. 433 (1830); *Baltimore and Carolina Line v. Redman*, 295 U.S. 654, 657 (1935).

That the right to jury trial under common law means the right to have the facts of the case examined by a jury, which jury shall be supervised at all times during the trial of the case by a judge only, when clearly established by this Court in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899).

Mr. Justice Gray in that opinion traces the historical development of trial by jury under common law and its introduction into the Colonies. It was his view from a reading of history that trial by jury with a judge was the intendment of the Colonies as expressed in their Constitution and the Framers of the Constitution—for trial by jury under the common law of England was only such trial. This of course did not mean that trial by jury

supervised by a judge was the only method of jury trial in England. For example justices of the peace were authorized by English statutes to summon jurors to inquire whether any forcible entry was made on land or whether land was being forcibly detained. 8 Hen. VI C.9. Trial before justice of the peace was adopted in Maryland, Md. Constitution 1776.

B. Trial by Justice of the Peace-Jury and Subsequent Courts in the District of Columbia of Possessory Actions for Property.

By virtue of the Organic Act of 1801, 2 Stat. 107, justices of the peace became part of the civil jurisdiction of the District of Columbia and their role in the development of that jurisdiction has been summarized as follows:

* * * * *

DISTRICT OF COLUMBIA COURT OF GENERAL SESSIONS

1. History of the Court

"Civil Jurisdiction Prior to 1942

The history of the District of Columbia Court of General Sessions is traceable back to that part of the Organic Act of 1801 which provided for the appointment of Justices of the Peace and vested them with all the duties required of Justices of the Peace in those parts of the District for which they had been appointed in all matters civil and criminal and those relating to keeping the peace. The Justices of the Peace were not a court of record and, very clearly, were not a part of the federal judicial system. *United States v. Mills*, 11 App. D.C. 500, 507 (1897). The act did not require that the Justices be learned or experienced in the law, the only

requirement being that they be 'discreet persons.'

The Justices were a carryover form the minor courts of England, such as the courts baron and the magistrates courts of the colonies and their sole function was to handle 'petty' claims and 'petty' offenses that were too minor to warrant the time and attention of the courts of general jurisdiction. *United States ex rel Brightwood Ry. v. O'Neal*, 10 App. D. C. 205, 233 (1897), aff'd *Capital Traction Co. v. Hof*, 174 U.S. 1. The civil jurisdiction of the Justices of the Peace was limited to cases involving no more than twenty dollars, a limitation which was apparently suggested by the Constitutional entitlement to a jury trial in all civil cases involving more than that amount. *United States ex rel Brightwood Ry. v. O'Neal, supra.*

As noted in the foregoing discussion of the history of the District Court, the civil jurisdiction of the Justices of the Peace was gradually increased over the next hundred years. This jurisdiction was increased to fifty dollars in 1823 and to $100 in 1867 (concurrent with the Supreme Court of the District in actions above fifty dollars). In 1895 the jurisdiction was increased to $300, with exclusive jurisdiction up to $100.

These increases in jurisdictional amount were not, however, accompanied by any corresponding increase in the judicial stature of the Justices. The court of the Justices remained a petty tribunal. The Act of 1823 subjected their decisions to de novo review by the Circuit Court in all cases where the amount in controversy exceeded five dollars. Although that Act did empower the Justices to empound jurors and conduct trial by jury, this was not a jury trial in the constitutional sense and on appeal either party could demand that the case be retried by a jury of the Circuit Court, *Capital*

Traction Co. v. Hof, 174 U.S. 1, 39 (1899). The Court in that case went on to remark that 'a justice of the peace, having no other powers than those conferred by Congress on such an officer in the District of Columbia, was not, properly speaking, a judge or his tribunal a court; least of all a court of record.'

The Act of March 3, 1901, officially constituted the Justices of the Peace as an inferior Court of the District of Columbia. The new Court has exclusive jurisdiction over civil actions formerly within the power of the Justices of the Peace where the amount claimed did not exceed $50. Jurisdiction was concurrent with the Supreme Court from $50 to $300 and in cases of concurrent jurisdiction, the case could be removed to the Supreme Court by certiorari. Moreover, in cases involving more than $5 either party could still appeal to the Supreme Court, where a trial de novo could be obtained.

The Act of February 17, 1909, changed the name of the Justice of the Peace Court to the Municipal Court of the District of Columbia, and the jurisdictional amount was increased to $500 with exclusive jurisdiction up to $100.

The Municipal Court was not a court of record; there was no provision for trial by jury; the Court had no equity powers. It was, in essence, simply a continuation of the Justice of the Peace Court under a new name. Like its predecessor, it was an inferior court similar in jurisdiction to the Justice of the Peace courts in the States and occupied, in the judicial system of the District, the same relationship as a Justice of the Peace Court does to the Courts of a State. It has been observed that the purpose of the Municipal Court (like its predecessors) was to provide a tribunal for the speedy disposition of a large number of small claims.

The Act of March 3, 1921, brought about the first major overhaul of the Municipal Court. That Act enlarged the exclusive jurisdiction of $1000. It also gave the Court jurisdiction over civil actions for assault, assault and battery, slander, libel, malicious prosecution, and breach of promise to marry. The Court was made a Court of Record. A system of jury trials was instituted. The right of removal and appeal to the Supreme Court was abolished. Appeal was authorized to the Court of Appeals for the District of Columbia upon a petition to any Justice thereof, the grant of which was discretionary. The Court was given the power to make rules of practice.

This Act appears to be an obvious attempt to upgrade the Municipal Court and to channel into it local cases of a more important nature. It also appears clear that Congress wished to retian the ability of the Court to deal swiftly with a large number of small cases. In *Schwartz v. Murphy* the Court noted that the Municipal Court was not given jurisdiction to try title to land because to do so would clog the Docket and dilute this major purpose of the Court. * * * 573, 574 Hearings on S 1066, et al. Before the Senate Committee on the District of Columbia and Senate Subcommittee of the Comm. in the Judiciary; 91st Congress, 1st Session, Part 3. (Footnotes omitted)

Landlords since the creation of the District of Columbia have tried their possessory actions before justice of the peace and successor tribunals to where today the lineage rests with Landlord and Tenant Branch, Superior Court for the District of Columbia.

C. Trial by Justices of the Peace-Jury of Possessory Actions, Without Right to De Novo Trial in a Court of Record is not Trial by Jury Under the Seventh Amendment.

The Seventh Amendment is applicable to the District of Columbia in civil ~~as well as criminal~~ cases. *Capital Traction v. Hof, supra*. From 1801 to 1823, trials in the District of Columbia were held by justice of the peace-jury without right of appeal. Such a trial was not a jury trial in the meaning of the Seventh Amendment. In 1823 de novo appeal to the Circuit Court was granted. 3 Stat. 743. However that law indicates that the de novo trial was available only in appeals from justice of peace-jury trials in actions involving debts. No mention is made of any right to appeal from the justice of the peace-jury in processory actions to recover land. This Court in *Capital Traction v. Hof*, tracing the development of 3 Stat. 743 commented that the Statute was based upon New York Statutes and the Maryland Statute of 1809 c. 76. Those statutes were concerned with appeals de novo from justice of the peace-jury trials on actions of debt or damages. Since this Court's decision in *Capital Traction v. Hof*, p. 39-41 indicates that Chief Justice Cranch in the Circuit Court had adjuged albeit erroneously in *Smith v. Chase*, 3 Cranch C. C. 351 (1828) and other cases that no appeal de novo could be had from a justice of the peace-jury trial for such trial would require the re-examination of facts found by a jury, in contravention of the Seventh Amendment, judicial authority is lacking on whether 3 Stat. 743 was made applicable to justice of the peace-jury trials for the recovery of repossession of land.

It is our view that appeals from justice of the peace-jury trials were not available in landlord and tenant

actions for two reasons. Firstly, there is the holding of Chief Justice Cranch in 3 Cranch C. C. 351 that:

> "* * *this court has no common law appellate jurisdiction to revise the judgments of justices of the peace either by writ of error, writ of false judgment or certiorari* * * *."

Secondly, the language in 3 Stat. 743 which concerns appeals from justice of the peace-jury trials pertains only to debts. It appears that both the judicial and legislative branches of government concerned with District of Columbia affairs at that time intended to retain the summary characteristics of the proceeding by which the owner invokes the aid of the justice of the peace in seeking repossession of his land. This was the state of the procedural law and jurisdictional law pertaining to landlord and tenant relationship in the District of Columbia until 1864, when in 13 Stat. 383 Congress redefined landlord and tenant proceedings and also provided right to trial de novo before a jury in the Supreme Court of the District of Columbia only if trial was held by justice of the peace sitting alone. Accordingly from 1801 until 1864, Congress did not authorize the courts in the District of Columbia to entertain appeals from actions brought by owners seeking repossession of their property by virtue of justice of the peace-jury trials. Congress's action in this regard, in our judgment, is consistent with the substantive rights which an owner has to have a summary process of repossession for his land which had its beginning in 1801 in the District of Columbia with the Act of Maryland 1793, Ch. 43.

We contend that the need for the summary nature of the proceeding in the District of Columbia to recover one's land which began then must be continued in such

proceedings brought today. The concept of ownership of one's property has not changed from 1801 to the present day. An owner's right under law to recover immediately his property when his possessory rights accrue is fundamental to the concept of private property rights under our political system. The lower court held that petitioners right to trial by jury be denied because trial by jury in the District of Columbia at its inception in landlord and tenant possessory actions, was not conducted in a common law court. They were conducted before justices of the peace and jury and such trials did not meet the definition of the common law court trial required by the Constitution as defined in *Capital Traction v. Hof, supra*. This Court's decision in *Block v. Hirsh*, 256 U.S. 135 1921 was cited by the lower court as authority that right to jury trial in summary possessory proceedings depended wholly on statute. Petitioner asserts that (Petitioner's Brief p. 39-40) this Court's decision was indicative of the principle that Congress may temporarily impinge Seventh Amendment rights when enacting temporary emergency legislation. However it is of interest to note that the vigorous dissenting opinion in that decision supporting the minority's position that the emergency legislation violated Fifth Amendment Rights of Due Process of the lessor and hence the legislation was unconstitutional, makes no mention of the lessor's right to a jury trial under the Seventh Amendment.

D. The Closest Historical Analogy to a Summary Proceeding Wherein the Landlord Seeks Repossession of His Property for Non-payment of Rent was the English Statutes of Forcible Entry and Detainer Which were not Tried in Common Law Courts.

Petitioner's brief (p. 25-31) seeks to demonstrate that the landlord's action is one which must be tried by jury

because it is a refinement of English real property actions—the assize of novel dissension, the writ of entry and the action of ejectment. He finds support in decisions of this Court wherein it is stated to the effect that all actions to recover real property are legal actions; thus being legal actions the parties are entitled to Seventh Amendment rights. *Scott v. Neeley*, 170 U.S. 106, 110 (1891); *Whitehead v. Shattuck*, 138 U.S. 146 (1891); *Ross v. Berhard*, 396 U.S. 531 (1970). The cases cited are all distinguishable on their facts since none involved a landlord seeking repossession of his property for non-payment of rent.

The guiding principle established by this Court in interpreting the application of the Seventh Amendment to controversies in civil actions has been to determine by historical analysis what the Framers intended in 1791 the year of the adoption of the Bill of Rights. Accordingly, it has been held that rights of trial by jury is preserved by the Seventh Amendment if the right is one which existed under the English common law at the time of adoption. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897).

The Act of Maryland 1793, Chapter 43, was adopted as part of the law of the District of Columbia by virtue of the Organic Act of 1801. The Maryland law provides a summary mode for recovery of possession of land and tenements from tenants holding for years or at will after the expiration of a tenancy which provided for a complaint before two justices of the peace, a notice to quit and a trial by jury. The sole issue before the jury was a determination that the lease had expired, that notice had been given to the tenant to quit, which the tenant

refused to do. After the jury's determination, a writ of restitution for possession of the property was to be given by the justices to the sheriff for the lessor's repossession of his lands. If the tenant claimed a right to possession by virtue of a title to the lands then such title was prosecuted at the County Court and the writ of restitution withheld pending that determination. The tenant could appeal his dispossession by way of a writ of certiorari to the County Court which exercised a quasi appellate jurisdiction. *Rawlings v. Rawlings*, 3 H. and McH. 254 (1796).

The Maryland Court in *Crockett v. Parke*, 7 Gill 181 (1848) on an appeal to its court from a county court appellate review by way of certiorari to a justice of the peace-jury trial under law of 1793, Ch. 43 ruled that the appeal could not be granted from the County Courts. To do so the Court held would defeat the Assembly's intention that Maryland Act of 1793, Ch. 43 provided a swift and speedy process for recovery of the owner's lands and tenements.

The summary nature of the proceeding was again apparent in the case of *Mousley v. Wilson*, 1 Md. Ch. 301 (1848). There the Chancellor, High Court of Chancery ruled that under the Act of 1793, Ch. 43 the justice of the peace was only authorized to forbear restoring the landlord to possession when title was disputed. In Maryland a justice of the peace court is not considered a court of law. *Weikel v. Cate*, 58 Md. 105 (1882). In 1864 Congress passed its first law 13 Stat. 383 for the District of Columbia establishing a procedure for the landlord to dispossess one unlawfully in possession. The law provided in part when "forcible entry is made or when a peaceable entry is made and the possession unlawfully held by force, or when the possession is held without right, after the estate is determined by the terms of the lease by its

own limitation, or by notice to quit or otherwise." Trial was to be held before a justice of the peace with no authority to try title.

Mr. Justice Gray in his opinion in *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, commented that the District of Columbia law was patterned after a law adopted by the State of Massachusetts in 1836, as amended in 1860. The resemblance of the two laws was so similar that in his view when Congress enacted its law it was aware of the construction which the Massachusetts law received in its Courts and accordingly Congress adopted the Massachusetts construction.

The Massachusetts Court in interpreting the historical development of the revised Statute of Massachusetts 1836 stated in part,

> "Before 1620 there were many English statutes and decisions upon the general subject of forcible entry and detainer. See Sts. 2 Edw. III. c. 3, prohibiting force; 5 Rich. II. c. 8; 15 Rich. II. c. 2; 4 Hen. IV. c. 8; 8 Hen. VI. c. 9; 31 Eliz. c. 11; 21 James I. c. 15' Cromp. 76, 163; Dalt. c. 125; Com. Dig. (Forcible Entry); 4 Bl. Com. 148. The state of the early law was considered in the decisions of this court in *Commonwealth v. Shattuck*, 4 Cush. 141; *Howard v. Merriam*, 5 Cush. 563; *Presbrey v. Presbrey*, 13 Allen 281; *Hodgkins v. Price* 132 Mass. 196. It would seem that every forcible entry by private individual was unlawful, and might subject him to punishment, and that in addition, in most cases, the person forcibly put out of possession might be put back by legal proceedings without regard to the question of the true title or right of possession. Ordinarily, the status of possession before the force was restored by the interference of the public power acting through public officers."

Page v. Dwight, 170 Mass. 29, 30 (1876); *Boyle v. Boyle*, 121 Mass. 85 (1876).

The summary proceeding statute of Massachusetts had its roots in the old English statutes of forcible entry and detainer which were supplemented by the Massachusetts legislature to include a summary remedy to settle disputes between landlords and tenants. In the light of the interpretation by the Massachusetts courts as adopted by this Court in *Willis* it is hardly likely that the ancestor of current summary proceedings given to landlords had its basis in the ancient writs of ejectment and writs of novel disseisin. The writ of novel disseisin has been lost in English antiquity while the writ of ejectment has been maintained to the current day as an action in ejectment whereby one seeks to obtain title to his property.

The Municipal Court of Appeals for the District of Columbia 1944, *Thurston v. Anderson*, 40 A.2d 342 (1944) in interpreting 11 D. C. Code 735, 1940, the landlord and tenant statute of 1940, asserted that the statute was originally based on the 1864 statute which although re-enacted (without change) in RS of 1874 with added clauses in Code of 1901 and 1929 was essentially the same as the 1864 law so the court was bound by this Court's decision in *Willis* and held that on page 344,

> "The act was declared to have been an adoption for this jurisdiction of the Massachusetts statute relating to actions of forcible entry and detainer. Its enactment by Congress, the court held, imported into its provisions the interpretation they had previously received in the Massachusetts court."

The District of Columbia Court ruled that the District of Columbia summary proceeding statute was neither a substitute for ejectment nor was a substitute for an action of trespass.

Trial by justice of the peace in England was not a trial in a common law court. One of the primary functions of the justice of the peace was to preserve the King's order and in this connection he was given the authority to inquire pertaining to forcible entry and detainer. Appeals from trials held by justices of the peace were not a matter of right but by certiorari. Another method of seeking redress from one who believed himself grieved by a justice of the peace would be to appeal to a justice of the peace residing nearby and failing that, appeal to the King or his chancellor, who might examine the complaint to determine if the justice of the peace ought to be removed from office. Beard, Justice of the Peace in England. McVicker "The Seventeenth Century Justice of the Peace in England," 24 Ky. Journal 387 (1936).

The progenitor of the Maryland Statute Act of 1793 and the initial law in the District of Columbia dealing with landlord and tenant relations Act of Congress, 1864, c. 3 are not predicated upon the writ of ejectment, the writ of entry or writ of novel desseisin as asserted by the petitioner. Historically summary process for repossession of real property by landlords arose out of the English common law by virtue of various statutes pertaining to the forcible entry and forcible detainer of lands by persons who exerted superior force and thereby ousted the persons in possession from that possession. The fundamental purpose of the statute was to prevent breaches of the peace and self help by those persons entitled to possession; 3 B. Com. 179; 4 Bl. Com. 148.

The English statutes described in detail in IV Bacon Abridgment of the Law 321-334 (Bouvier ed) and the cases cited therein clearly discloses that the forcible entry and detainer statute enforcement fell within the responsibility of the justice of the peace. The justice would hear

the complaint, direct the sheriff to summon a jury and resotre the party put out to possession on the verdict of the jury. Questions of title were not considered by the justice of the peace.

There is no doubt that landlord and tenant actions are most numerous in our urban society. Perhaps the trend toward increased condominium ownership is indicative of a reduction of summary process actions. If so, the courts may be adjudicating fewer disputes involving property for in the District of Columbia and in many states foreclosures of deeds of trust or mortgages do not invoke judicial assistance.

Perhaps the non-invocation of judicial assistance by common law courts was uppermost in the minds of English landlords when they turned away almost entirely from writs of ejectment and related real actions, either because they could not understand them or found them too cumbersome, and sought recovery of their land using the remedy provided in the statute of 8 Hen. VI in a justice of the peace proceeding. 1 Hale, History of Common Law 296-301 (Runnington ed. 1794); 3 Reeves History of English Law 488 (Finlason ed. 1880).

By 1886 one who had forcibly obtained or unlawfully detained possession of lands could be summarily removed and possession restored to the person entitled by means of summary procedures available in every state. These procedures were brought before justices of the peace in all states, except North Carolina, and immediate relief was granted unless a plea of title was made which deprived the justice of the peace of jurisdiction. Murfree, The Justice of the Peace, 558 (1996). It would seem that if the proceeding for repossession of property by landlords were relegated by the various states to their most inferior tribunals which were not considered courts of law, that it was intended that the rules of evidence, strict

pleadings and proof normally associated with a trial before a court were not needed nor desirable. To have permitted this would be inconsistent with the nature of the summary proceeding. See also 3A Thompson, Real Property, par. 1370, and cases cited for the proposition that statutes relative to actions of summary process for possession by a landlord conferred new rights and prescribed a course of proceeding unknown to common law.

We contend that the historical analysis of the action of forcible entry and detainer which in the first instance sought to quiet breaches of the peace, when examined within the framework of English common law, was an action of perhaps no greater significance than a petty crime punishable without jury.

Since rights to ownership of land were the keystone to the development of English common law and since the jury was integral to the resolution of landowner's rights, it is not surprising that the common law required a jury trial for a breach of peace which took place on private property. The right to peaceful possession was achieved by the force being removed under the authority of the justice of the peace after jury trial, and not by a jury's determination of ownership rights to the property.

In our modern society summary proceedings available to the landlord to regain his unlawfully detained property have by law been made available to him to prevent him from using self-help—which may lead to a breach of the peace. The common law right to self-help still exists in the District of Columbia, *Snitman v. Goodman*, 118 A.2d 394 (1955). The action available to his English ancestor under common law, accrued as soon as the force or the breach of the peace took place. The rights sought to be protected are identical—that is the right to possession of one's property—to the Englishman after the force

has occurred–to the American to avoid force. Under English common law such right under the circumstances described did not warrant a trial in a common law court and none was provided. Accordingly the Seventh Amendment does not command a jury trial.

Although the legislative history concerning repeal of the jury right is not clear, it could be argued that Congress intended to expedite the trial of local matters especially in view of the fact that it increased the number of judges in the Superior Court to 44 from the 16 formerly in the Court of General Sessions. To conclude that Congress repealed the statutory right to jury trials pertaining to the repossession of real property was "superfluous in the light of Constitutional jury trial requirements" misreads Congress's careful consideration of Constitutional principles in the same Act which repealed the legislative right to trial by jury. Congress reiterated "In criminal cases tried in the Superior Court in which according to the Constitution the defendant is entitled to a jury trial, the trial shall be by jury." (Underscoring supplied) 16 D. C. Code 705. This is hardly the language which the Congress would use if it chose to leave Constitutional rights to chance with relations to trials in the newly established Superior Court of the District of Columbia.

II.

THE SEVENTH AMENDMENT DOES NOT GUARANTEE A TRIAL BY JURY TO A TENANT WHO ASSERTS CLAIMS BY WAY OF EQUITABLE RELIEF TO A STATUTORY EVICTION PROCEEDING FOR NON-PAYMENT OF RENT.

A. Right to Trial by Jury as it Existed at Common Law and Equity.

The Seventh Amendment by its terms "preserves" the right of jury trial in suits at common law where the value of the controversy exceeds twenty dollars. History teaches us that the Framers of the Constitution were concerned with insuring that the right to trial by jury in civil cases was preserved to the States. This was in recognition of the diversity in how various civil actions in the States were tried and a fear that civil juries might be abolished unless protected by express language in the Constitution. 2. M. Farrand, Records of the Federal Convention 587 (1911); Henderson, "The Background of the Seventh Amendment," 80 Harvard Law Review 289 (1966); The Federalist Papers, No. 83; *Parsons v. Bedford*, 28 U.S. 443, 446 (1830).

Suits at common law with reference to the Seventh Amendment have been interpreted to exclude suits in equity and admirality. This was the view of Justice Story that the words common law established a general rules in the trial of civil cases. In his Commentaries on the Seventh Amendment and the Judiciary Act of 1789 he writes "The phrase 'common law' found in this clause is used in contradistinction to equity, and admirality and maritime jurisprudence—It

is well known that in civil causes, in courts of equity and admirality, juries do not intervene, and that courts of equity used trial by jury only in extraordinary cases to inform the conscience of the court." 3 J. Story, Commentaries on the Constitution of the United States, 645-646 (L. Levy, Ed. 1970).

B. Tenant Relief Is Equitable By Way of Recoupment and Set Off.

The petitioner has characterized the recovery he seeks as money claims by way of damages for breach of lease obligation. The fact of the matter is that the landlord has not sued to recover for rent due. Such an action would be one in law for contractual breach of a lease provision. A counterclaim to such suit would probably fit the better definition of a legal claim for damages. This suit by the landlord was solely for statutory eviction due to non payment of rent. The landlord is in effect saying pay the rent due or return possession of my property back to me. If the rent is not owing then the landlord cannot repossess his property. What the tenant is seeking is *not* damages. Rather he is asserting that he does not owe the amount of the rent which the landlord claims is due him because such amount should be reduced or diminished for the reasons set forth in his pleadings. If he can establish that dimunition equals the amount of rent due then he has of course prevailed against the landlord who may not repossess for non-payment of the rent. The court below was correct in characterizing the tenant's claims as those of equitable relief by way of equitable recoupment and set off. Recoupment exists in equity as well as common law while "set off" is a right long granted in equity to avoid

circuity of action. 20 Am. Jur. 2nd. Counterclaim, Recoupment and Set Off, Section 6 and Section 7. Thus equitable recoupment and set off being rooted in equity are not triable by jury within the admonition of the Seventh Amendment. James "Right to a Jury Trial in Civil Actions," 72 Yale L. J. 655 (1963).

C. Ruling in Beacon Theatres is not Controlling in Actions Arising in the Landlord and Tenant Branch, Superior Court of the District of Columbia.

In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959) this Court held that a Federal court could not, in a controversy containing both legal and equitable elements with common factual issues, deprive a litigant of his right to jury trial on issues material to the legal elements by ordering first the disposal of the equitable elements. The reasoning of the court was predicated upon its re-evaluation of the liberal joinder provisions of the Federal Rules and its reconsideration of equitable remedies in view of the Declaratory Judgment Act, 359 U.S. 508-509. Again in *Dairy Queen v. Wood*, 369 U.S. 469 (1962), this Court reiterated the need to join legal and equitable issues in a single action so that the right to trial by jury would not depend on the choice of words used in pleadings. Here again the Court was construing the application of the Federal Rules of Civil Procedure to actions in Federal Courts.

The plenary legislative power of Congress with respect to the District of Columbia is well established under the Constitution Art. I, Sec. 8, Cl. 17. Not only may Statutes of Congress passed for national

purposes be made applicable to the District of Columbia but the Congress can exercise all police and regulatory powers which a state legislature or municipal government would have in legislating local matters, *Palmore v. United States*, 411 U.S. 389 (1973).

In legislation creating the trial courts for the District of Columbia, Congress has consistently avoided making the Federal Rules of Civil Procedure applicable to the extent that Federal Rules of Civil Procedure are applicable to Federal Courts. It is indicative of Congress's awareness that procedural rules for courts dealing with local matters at the municipal level are vastly different from the kinds of intricate legal problems generated by the numerous Federal questions litigated in Federal courts. 11 D. C. Code 946 provides in part:

> "The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure–unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals and they shall not take effect until approval by that court."

Pursuant to the authority granted by Congress to the Superior Court and the District of Columbia Court of Appeals, rules were adopted, effective February 1st, 1971, for proceedings in the Landlord and Tenant Branch, D. C. Superior Court to govern the procedures in summary proceedings for possession pursuant to 45 D. C. Code 909 and 16 D. C. Code 1501, Rule 1 enjoins that the rules:

> "Shall be construed to secure the just, speedy and inexpensive determination of every action."

Rule 2 is authority for excluding most of the Superior Court Rules of Civil Procedure including Rule 13 which reads almost identical with Rule 13 of the Federal Rules of Civil Procedure concerning compulsory and permissive counterclaims. Rule 2 adopts for the Landlord and Tenant Branch certain of the rules of the Superior Court Rules of Civil Procedure excepting where such adopted rules are inconsistent with the provisions of the Landlord and Tenant Rules or the summary nature of the proceedings in the Branch. The rules currently governing procedures in the Landlord and Tenant Branch which seek to implement speedy determination of summary proceedings between landlord and tenant are consistent with rules which have prevailed previously in the Landlord and Tenant Branches of the former D. C. Municipal Court and D. C. Court of General Sessions, e.g. rules for Landlord and Tenant Branch, District of Columbia Municipal Court January 1952, and Rules for the Landlord and Tenant Branch, D. C. Court of General Sessions, January 1964.

If it is argued that the principles of *Beacon Theatres* and *Dairy Queen* ought be applied to the District of Columbia Courts because those Courts have adopted rules which parallel in some particulars the Federal Rules of Civil Procedure, this Court's statement in Beacon Theatres that "Our decision is consistent with the plan of Federal Rules and The Declaratory Judgment Act to effect substantial procedural reform while retaining a distinction between jury and non-jury issues and leaving substantive rights unchanged," 359 U.S. 508, 509 is most appropriate. This Court's affirmation of the distinction between jury and non-jury issues, that is to say actions at law

and actions in equity is of pertinency to procedures pertaining to actions between landlords and tenants in the District of Columbia, where the District of Columbia Courts have traditionally maintained the substantive right of the landlord to bring a summary proceeding for repossession of his property for non-payment of rent defensible by the tenant only on equitable grounds.

D. Tenant's Defenses to Landlord's Summary Proceedings Are Equitable Only.

In 1936 the United States Court of Appeals for the District of Columbia in *Smith v. O'Connor*, 88 F.2d 749, (1936) ruled that a denial of any default in rent payment is in effect an equitable defense to the landlord's claim for possession. The court cited this Court's opinion in *Dushane v. Benedict*, 120 U.S. 630 (1886) wherein on page 648, this Court stated,

> "By way or recoupment or equitable defense, which is limited to defeating the plaintiff's action, in whole or in part, the defendants may avail themselves of any evidence tending to show that by reason, either of a breach of warranty, or of a fraudulent representation, the goods were worth less than they would have been if they had been such as they were warranted or represented to be; as well as of any evidence tending to show that the defendants suffered damages, which, in the contemplation of the parties, or according to the natural or usual course of things, were the consequence of the breach of warranty, or the fraudulent representation.
>
> But under their counterclaim, seeking, as permitted by the statute of Pennsylvania, not only to defeat the plaintiff's action, but also to re-

> cover an affirmative judgment against him, they can avail themselves only of a claim sounding in contract, in the nature of an action to assumpsit upon the supposed warranty. If they fail to prove a warranty, express or implied, the statute can have no application; because it extends to no claim sounding in tort only, whether in the nature of an action of deciet, or of such an action as these defendants might maintain against a person, with whom they never had any contract, who wilfully or negligently introduced the small-pox into their mill."

Numerous cases of the District of Columbia Court of Appeals have reaffirmed the well settled rule that equitable defenses may be asserted to the landlord's claim for possession, to avoid circuity of actions and in denial of default to the landlord's complaint of non-payment of rent. *Worthington v. Levy*, 204 A.2d 334 (1964) and cases cited therein. The District of Columbia Court of Appeals in the *Worthington* decision commenting on landlord and tenant law in the District of Columbia informs us that the trial court may find the amount in arrears even though no money judgment is claimed, so the tenant might know the amount owing and pay such arrears to defeat the landlord's claim for possession. The trial court in *Worthington* having determined the amount of the rental arrears treated the defense which was classified as a counterclaim, as harmless error, since no money judgment was demanded by the landlord and the court considered the counterclaim as a denial of delinquency in rent as an equitable defense. The D. C. Appellate Court in *Worthington* approved the trial court's application of such rule of law. This is in our opinion the correct interpretation and application of the phrase

"counterclaim" as used in landlord and tenant actions where it is asserted against a landlord seeking only repossession based upon non-payment of rent. By electing not to in the same complaint to seek rent due or past due, the landlord is reserving his remedy to a subsequent action founded in contract to where the tenant can defend by way of seeking a money judgment based on landlord's claim for rent.

To permit the tenant to defend by way of counterclaim seeking a money judgment under Rule 5(b) gives his procedural rights akin to counterclaim pleadings under rule 13 even though rule 13 is not applicable to actions in the Landlord and Tenant Branch.

To assert that the tenant's defense to landlord's suit for repossession converts the summary proceeding into an action at law by asserting a counterclaim under Rule 5(b) is contrary to owner's property rights when viewed in the historical content of forcible entry and detainer statutes and their evolution to present day actions for summary proceedings. Property rights rooted in our common and substantive laws are protected by the Due Process Clause of the Constitution. Ownership connotates rights to possession to exclusion of all. For a rule of court to be applied to compel a landlord to maintain a tenant with no right to possession in possession while the tenant asserts a claim for a money judgment raised as a legal defense by the tenant as a counterclaim is a deprivation of the landlord's property rights. Such application of the rule is inconsistent with the orderly development of a summary proceeding to recover real peroperty without resorting to self-help. A person's right to exercise the ownership rights of his property to the summary exclusion of others in his possessory action has been stressed by this Court in *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133 (1915); *Bianchi v. Morales*, 262 U.S. 170

(1923). The property owner's right to his property was recently re-emphasized by this Court in *Lindsey v. Normet*, 405 U.S. 56 (1972) where at page 68 it is stated: "Likewise, the Constitution does not authorize us to require that the terms of an otherwise expired tenancy be extended while the tenant's damage claims against the landlord are litigated."

Our argument is that the law of the District of Columbia permits only equitable defense to summary proceedings for the repossession of property and permits no claims for money judgment against one seeking only return of his property. The California Court is supportive of our argument when in *Union Oil Co. v. Chandler*, 84 Cal. Reporter 756 (1970) it was held that when the sole issue is right to possession neither counterclaim or cross complaints or affirmative defenses are admissable even though the alleged claim contained therein grew out of the subject matter involved. To permit such defenses would defeat the purpose of the summary remedy statutes and frustrate the landlord's right to restitution. In New York it has been held that counterclaim for money damages may not be interposed in summary proceedings seeking only possession of property. *Krutzeck v. Kruse*, 165 N. Y. S.2d 244 (1957).

It is not specifically known what the draftsman intended by the language used in Rule 5(b), D. C. Superior Court Rules of Procedures of the Landlord and Tenant Branch. Assuming that he is aware of this Court's opinion in *Washington-Southern Navigation Co. v. Baltimore & Phila. Steamboat Co.*, 263 U.S. 629 (1923) where on page 635, Mr. Justice Brandeis wrote:

> "The function of the rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulations of the forms, operation

> and effect of process; and the prescribing of forms, modes and time for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred." (Underscoring supplied)

We can only conclude that his language in Rule 5(b) was not intended to convert equitable defenses into legal defenses interposed against a landlord who in a summary proceeding is seeking repossession of his property for non-payment of rent. To have done this would convert the summary proceeding into a trial by jury. The rule under such interpretation would be contrary to the express intent of Congress when it abolished the right to trial by jury in actions for the repossession of real property. For all the tenant need do is to answer the landlord's claim by way of a counterclaim for money judgment thus compelling the trial court to empanel a jury. By pleading thusly, the tenant thwarts the summary nature of proceedings given the landlord by virtue of 16 D. C. Code 1501-1505, violates the landlord's Constitutional rights of due process to exclusive ownership of his property and thwarts Congress's injunction that jury trials are abolished in actions for the possession of real property.

The rationale and need for summary proceedings in landlord and tenant actions in the District of Columbia to

be swift and without delay by litigating other issues when the landlord seeks repossession of his property is described in the recent case of *Tutt v. Doby*, 459 F.2d 1195 (1972). There the court held that a default judgment in a suit for possession of premises based on non-payment of rent initiated by posting a summons on the tenant's door did not operate to make the issue of rent res adjudicata thus barring a subsequent suit by the landlord for the unpaid rent. The Court's comments on the nature of the summary procedure and the imperative need of such procedure is described on pages 174 and 176:

"The summary procedure is provided by the legislature to provide Court relief to the landlord, otherwise trapped by the 'relatively slow, fairly complex and substantially expensive procedure' of the commons law possessory action of ejectment; to avoid resort to self-help and force, condoned at common law as justified; and to permit an expenditious judicial determination of what remains a possessory action.

While there is no summary action for money due, the provision of a summary proceeding for the possession action harmonizes considerations of fairness with the felt need for expedition in settling possessory rights. On the one hand, there is need for dispatch in determining the right of the businessman to occupancy of rented premises. On the other hand, tenants may be relatively unconcerned with the matter of possession—they may indeed be ready to quit the premises of the landlord with whom they have had bitter disputes—but may be far from acquiescent on the matter of whether, and how much money is owed.

This principle for limitation of collateral estoppel effect of default judgments is rooted in the interest of justice, not only to the particular parties, but in overall administration. The doctrine of collateral estoppel is

intended to curtail needless litigation. If it were construed to require litigation by a tenant who does not contest the possessory relief sought, it would undermine the utility and indeed the very premises of the summary procedure, that expedition is appropriate because all that is involved is possession. The docket of the Landlord and Tenant Branch is crushing. We are advised that in 1969, 118,811 possessory cases were filed, almost 80,000 resulted in default judgments and another 32,000 were dismissed. Only a very small percentage of the cases-about 3%-ever got beyond the threshold state. If a tenant is ready to yield the possession that gives the landlord all the relief he sought in the possessory action, it is neither good administration nor just to require the proceeding to be delayed or protracted so as to litigate the issue of rent. The issue should be litigated separately, and de novo, according to the notice provided by law for personal actions for rent due."

E. Practical Considerations Do Not Favor Trial of Tenant's Money Damages by a Jury.

Petitioner's argument (Petitioner's Brief 49-52) for judicial efficiency by compelled merger of all "claims" arising in landlord and tenant in a single cause of action would in the name of efficiency destroy the right of a property owner to immediate repossession of his property. He would be precluded from using the summary procedure granted to him by Congress. What petitioner seeks to have the Court do may only be accomplished by Congress subject to the Constitutional requirements of Due Process. It is inferred that the alternative pleadings set out in Landlord and Tenant Rule 3 (either rent or repossession or both) and Landlord and Tenant Rule 5(b) (tenant's defenses) govern issues which are so intertwined and interwoven that a single case is compellable. Here

again the priority rule of *Beacon Theaters* and *Dairy Queen* is asserted but at this juncture it is equated to judicial efficiency. To adopt the petitioner's reasoning in this regard infers that the lower court should rewrite its rules of procedure in the Landlord and Tenant Branch.

To the respondent, the logic of the petitioner's argument for judicial efficiency, insofar as it pertains to the questions in this case, makes out a better case for a trial before a judge without a jury, if judicial efficiency were the paramount matter being considered here.

CONCLUSION

For the reasons stated, the judgment of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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Of Counsel
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September, 1973

No. 72-6041

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

DAVE PERNELL,

Petitioner,

v.

SOUTHALL REALTY,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR PETITIONER DAVE PERNELL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

IN THE

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This brief is submitted in reply to the brief of respondent Southall Realty and to the brief of the *amicus curiae* Apartment House Council of Metropolitan Washington, Inc. ("AHC").[1]

[1] The Apartment House Council, which supports Southall and opposes trial by jury in eviction proceedings, is an organization representing the interests of landlords. Its brief (p. 2) states that its members own or manage approximately 200,000 apartment units in the District and surrounding suburban areas.

I. THE SEVENTH AMENDMENT GUARANTEES A RIGHT OF TRIAL BY JURY IN THE DISTRICT'S STATUTORY EVICTION PROCEEDING.

For more than a century and a half, this Court has consistently read the Seventh Amendment as embodying an historical standard and, in the case of a statutory proceeding, has analogized the statutory claim to its closest historical counterparts for purposes of determining the right of jury trial. *E.g., Luria v. United States*, 231 U.S. 9, 27-28 (1913). Whether a modern action is in the nature of a suit at common law has been deemed to turn not on the transient forms of the action but on the substance of the right being enforced and the remedy sought. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830). Applying this historical test, the closest counterparts to the present District statutory eviction proceeding are common law actions all of which adjudicated the right to possession, all of which provided the remedy of eviction, and all of which involved trial by jury. Pernell Br. 25-31.

In addition, this Court, the lower courts and the commentators have repeatedly emphasized that suits to determine the right to possession of real property are classic common law actions triable to juries as of right.[2] The factual issues normally presented in eviction proceedings are peculiarly susceptible to jury determination and, in view of the social interests involved, a jury trial is highly appropriate. Finally, claims of inconvenience and delay alleged to result from jury trial in such cases are

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[2] *E.g., Ross v. Bernhard*, 396 U.S. 531, 533 (1970); *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891); *National Life Ins. Co. v. Silverman*, 454 F.2d 899 (D.C. Cir. 1971); 9 C. Wright & A. Miller, *Federal Practice and Procedure* §2316, at 77 (1971).

belied by the fact that juries were used in the District's statutory eviction proceeding for 170 years and continue to be used widely by many states in comparable statutory eviction proceedings. Pernell Br. 31-37.

Southall and AHC do not dispute that the historical test governs the application of the Seventh Amendment or that in applying that test, new statutory proceedings must be measured against common law counterparts. Neither of them denies that there did exist at common law several actions triable to juries which, like the present proceeding, adjudicated the right to possession and provided a remedy of eviction; and neither asserts that the District's proceeding corresponds to any recognizable proceeding in equity or admiralty in the English courts. The varying arguments Southall and AHC each advance against affording a jury trial in the statutory eviction proceeding do not withstand analysis.

The lower court in denying a jury trial relied principally upon this Court's decision in *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899). The decision below reasoned that since in 1899 this Court held that a jury trial before a justice of the peace did not satisfy the demands of the Seventh Amendment, it followed that the use of that mode of trial in the District's statutory eviction proceeding during the nineteenth century showed that the proceeding did not correspond to a common law action triable to a common law jury. Both Southall and AHC echo the claim that the justice of the peace jury trial is not a Seventh Amendment jury trial, but each hesitates to rely directly on *Hof* to show that

the eviction proceeding is not subject to the Seventh Amendment.[3] Their caution is well justified.

As Pernell has previously demonstrated, a justice of the peace jury trial was commonly regarded as satisfying the demands of the Seventh Amendment when, in the early part of the nineteenth century, the Maryland statutory eviction proceeding utilizing a justice of the peace jury was incorporated into District law. Pernell Br. 38. That this view of the courts was subsequently held erroneous in *Hof* merely indicates that parties to the statutory eviction proceeding should have been afforded a judge as well as a jury in the nineteenth century.[4] *Hof* has no application to the present case since the statutory eviction proceeding is now within the jurisdiction of a court of record presided over by a judge and fully competent to provide a trial by jury in the full Seventh Amendment sense.

The error of the lower court's reasoning is apparent when it is recognized that from 1823 onward the

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[3] Southall's brief repeats the claim that a justice of the peace jury is not equivalent to a Seventh Amendment jury (pp. 9-11) but, instead of drawing the lower court's erroneous conclusion, it switches abruptly to its forcible entry and detainer argument (pp. 11-18). The attempted FED analogy is one which the lower court never even suggested; and Southall's effort to support the lower court's judgment on this novel ground is discussed at pp. 5-9, below. AHC concedes that *Hof's* determination that a justice of the peace jury is inadequate for Seventh Amendment purposes does not "end the inquiry"; rather AHC acknowledges that the "constitutional jury trial question is to be resolved by fitting the [present] cause into its nearest historical analogy." AHC Br. 14-15.

[4] At least after 1864, a party to the statutory eviction proceeding could obtain a jury trial presided over by a judge in a court of record. Under the governing statute enacted in that year, trial by jury *de novo* in the District's Supreme Court was specifically contemplated. Pernell Br. 4.

District's justice of the peace court had jurisdiction of civil debt and damage claims up to $50. 3 Stat. 743. Thus, a debt claim for more than $20 could be tried by a jury presided over by a justice of the peace during most of the nineteenth century. It is now settled by *Hof* that, judged in retrospect, a justice of the peace jury trial standing alone was not adequate under Seventh Amendment standards. Yet no one supposes that this fact could be utilized to deny parties to a $50 debt action in the Superior Court today a trial by jury under the Seventh Amendment.

Southall's own main argument against a jury is quite different. It asserts that the true ancestor of the present statutory proceeding is not the common law possessory actions triable to a jury, such as novel disseisin and ejectment, but rather the statutory forcible entry and detainer action which developed in England beginning in the fourteenth century. Southall Br. 11-18. These FED statutes were designed to remedy breaches of the peace by punishing forcible entries into, or forcible detentions of, real property, and trials in such proceedings could be presided over by justices of the peace.[5] There are decisive

[5] While the District's justice of the peace court considered in *Hof* lacked the formalities and the powers of a common law court, the justice of the peace proceedings in England were quite different. The English justice of the peace court was a court of record; its original jurisdiction extended to virtually all felonies except treason and to limited administrative and civil jurisdiction as well; it employed a twelve-man jury; and its procedures were quite elaborate. See, *e.g.*, IV W. Holdsworth, *History of English Law* 138-150 (1924) (hereafter "Holdsworth"); C. Beard, *The Office of Justice of the Peace in England* 158-64 (1967 ed.) (hereafter "Beard"); McVicker, "The Seventeenth Century Justice of the Peace in England," 24 *Ky. L.J.* 387, 403-07 (1936).

differences between the English FED action and the present District proceeding.

The FED statutes in England, quite unlike the present District proceeding and many modern American statutes of the same name, were criminal statutes.[6] In origin, they provided only for imprisonment and fine of one who forcibly entered and took possession of real property. 5 Rich. II, c. 7; 15 Rich. II, c. 2. By a later enactment, the offense was extended to a peaceable entry followed by a forcible detention; and, in addition to the imprisonment and fine, the justice of the peace was directed to restore possession to the dispossessed party and the latter was afforded a treble damage remedy by assize of novel disseisin or trespass against the wrongful party. 8 Hen. VI, c. 9. The FED action was prosecuted through the usual criminal process.[7]

Even more important, the English FED proceeding did *not* adjudicate the right to possession (4 Blackstone *148), and in this critical respect it differed both from common law remedies such as ejectment and from the District's statutory eviction proceeding. The convicted defendant in an FED action in England might well have

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[6] In classifying and describing public wrongs, which comprised crimes and misdemeanors, Blackstone stated: "An eighth offense against the public peace is that of a *forcible entry* or *detainer*, which is committed by violently taking or keeping possession of lands or tenements, with menaces, force, and arms and without the authority of law." 4 Blackstone, *Commentaries* *148 (hereafter "Blackstone").

[7] Thus, the proceeding was brought in the name of the state; it involved arrest of the wrongdoer and was initiated by indictment; it was regularly tried at the justice of the peace's quarter sessions; and the gravamen of the charge was the unlawful use of force. See 8 Hen. VI, c. 9; *The King v. Wilson*, 8 Tr. 357, 101 Eng. Rep. 1432 (K.B. 1799); 4 Blackstone *148; II Holdsworth 452-53.

the better right to possession of the disputed property: the fault for which he was punished was the use of forcible self-help, and after the *status quo ante* had been restored, he remained entitled to use the normal civil remedies such as ejectment to regain possession. These principles are apparent from an examination of the English statutes cited above and the commentators, and they are confirmed by this Court's exposition of the forcible entry and detainer action in *Iron M. & H.R.R. v. Johnson*, 119 U.S. 608 (1887).[8]

Despite these differences, it is noteworthy that forcible entry and detainer actions did make use of the jury, at least for purposes of restoring to possession one wrongfully ousted by force. See 8 Hen. VI, c. 9; *Ford's Case*, Cro. Jac. 151, 79 Eng. Rep. 132 (K.B. 1607); Beard 68. Jury trials in the English justice of the peace court "proceeded in the manner of an ordinary jury trial in the king's court." Beard 161-62. Thus, even for the limited determination of property interests possible in an FED action, the tradition of jury trial prevailed.

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[8]The Court stated: "The general purpose of these [forcible entry and detainer] statutes is, that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title or *may have the better right to the present possession* but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are in *statu quo*, or in the same position as they were before the use of violence, *the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance.*" *Id.* at 611 (emphasis added).

Southall's attempted analogy also ignores the actual evolution of the District proceeding. Initially, the District statute was confined to adjudicating the right of possession in landlord and tenant disputes and made no reference to forcible entries and detainers. Between 1864 and 1953, it contained an FED provision *in addition to* the provisions relating to landlord and tenant disputes and other disputes in which the right to possession is actually determined. Pernell Br. 5-6.[9] In 1953, the FED provision was deleted from the statute, and the original provisions concerning landlord and tenant disputes and certain other controversies involving the right of possession were broadened to cover all cases where the right to possession was placed at issue. See *id.* at 6. The present statute now contains no substantive provision whatever embodying the FED action, and only the phrase remains as a misnomered caption.

Whatever name may be given to the District's present statute, today it is in substance a civil proceeding to determine the right to possession of real property; the actions which did so in 1791 in England were common law actions triable to a jury.[10] Even if the present District proceeding were regarded as a descendant of the English FED action as well as the progeny of novel disseisin and ejectment, it would not affect the outcome of this case.

[9]Under the 1864 statute, the eviction proceeding extended to two essentially different classes of cases: (1) "forcible entry" and "possession unlawfully held by force"; and (2) "possession . . . held without right, after the estate is determined by the terms of the lease by its own limitation, or by notice to quit, or otherwise . . . ." 13 Stat. 383.

[10]It appears that the classical forcible entry and detainer proceeding began to fall into disuse as early as the seventeenth century. See E. Jenks, *A Short History of English Law* 177 (4th ed. 1928).

For, at its present stage of evolution, the District proceeding corresponds to the common law civil possessory actions in terms of the right involved and the function performed. No one would contend that a civil trespass action is not subject to the Seventh Amendment, even though it is well settled that in origin trespass was a criminal proceeding. II F. Pollack & F. Maitland, *History of English Law* 620 (2d ed. 1968).

AHC has not argued that the District proceeding corresponds to the English FED proceeding, nor has AHC sought to justify denial of jury trial on the gound that the District proceeding corresponds to any known equitable action where a trial by jury was unavailable in 1791. Instead it simply appears to assert that the proceeding is a statutory one which differs in certain procedural respects from common law proceedings such as novel disseisin and ejectment. The distinctions are mistaken and would not in any event justify denial of jury trial in the present case.

First, AHC seeks to distinguish novel disseisin on the ground that the jury there involved was analogous to the panel held in *Hof* not to constitute a common law jury. AHC Br. 16-17. Apparently it believes that in novel disseisin, as in *Hof*, the jurors were not under the supervision of a full-fledged judge and therefore could not constitute a true jury. In fact, novel disseisin proceedings were tried not before sheriffs or justices of the peace but before the king's justices either in their home courts or traveling on circuit.[11] Novel disseisin is, in fact, one of the root sources of the jury in the English common law courts in numerous actions including ejectment which developed in subsequent years.

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[11] I Holdsworth 276; D. Sutherland, *The Assize of Novel Disseisin* 59-60 (1973) (hereafter "Sutherland"); Magna Carta, cc. 18-19 (quoted in Sutherland 60).

Reference to novel disseisin also serves to confirm that there is no doctrinal inconsistency between a swift and summary action and the use of trial by jury. Compare Southall Br. 13-15. While jury trial was central to the action of novel disseisin (Sutherland 18), "rules intended to expedite the case were woven into every stage, continually shaping the proceedings." *Id.* at 20.[12] The combination of speed and "a rational form of proof, namely, trial by jury" (*id.* at 38) were among the very elements that made the action so popular for centuries as the foremost means of resolving disputes over possession. *Id.* at 35-40.

Second, AHC asserts that the District proceeding cannot constitute ejectment because D.C. Code §16-1124 (1967) contains an action allegedly corresponding to common law ejectment. That action is not common law ejectment but merely one of ejectment's modern descendants. Pernell Br. 30. The District's statutory remedy is no less a descendant of common law ejectment and the decisions in the District have over the course of many years repeatedly referred to the District's statutory remedy as comprising a "substitute" for ejectment.[13]

Ejectment was the latest of a long series of common law actions tried to juries which evolved to determine the

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[12]Bracton said that assize proceeded "by summary investigation" and the statute of Westminster II stated: "There is no other writ . . . that gives plaintiffs such quick justice as does the writ of novel disseisin." See Sutherland 126-27.

[13]*E.g.*, *Shapiro v. Christopher*, 90 U.S. App. D.C. 114, 123, 195 F.2d 785, 794 (D.C. Cir. 1952); *Service Parking Corp. v. Trans-Lux Radio City Corp.*, 47 A.2d 400, 403 (D.C. Mun. App. 1946); *Shipley v. Major*, 44 A.2d 540, 541 (D.C. Mun. App. 1945); *Lenox v. Arguelles*, 4 D.C. 477, Fed. Cas. No. 8244 (C.C.D.C. 1834) (referring to original Maryland statutory proceeding).

right to possession of real property.[14] By 1791, it was certainly the preeminent means of determining the right to possession of real property in the English courts (VI Holdsworth 625-26), although older common law actions to recover real property were intermittently employed well into the nineteenth century. VII Holdsworth 22-23. If the historical test sanctioned by this Court is followed, it is clear that at the time the Seventh Amendment was adopted, actions to determine the right to possession of real property were suits at common law triable to a jury.

AHC's attempted distinctions misconceive the standard to be applied under the Seventh Amendment in comparing common law actions with modern statutory proceedings. From *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830), through *Ross v. Bernhard*, 396 U.S. 531, 533 (1970), this Court has declared that the amendment embraces "not merely suits, which the common law recognized among its old and settled proceedings" but "all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." What is decisive for constitutional purposes is the basic correspondence between the right and remedy in the English common law actions tried to juries and the present District proceeding.

The basic correspondence between the common law actions and the subsequently devised statutory eviction proceedings is acknowledged by the very authorities relied on by AHC. Thus, Thompson on *Real Property*,

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[14]These actions were not, of course, limited to the three principally discussed in the briefs—novel disseisin, entry and ejectment. Others, adapted to particular contingencies, are described in F. Maitland, *The Forms of Action at Common Law* 29-33 (1962 ed.).

partially quoted by AHC Br. 11, confirms this relationship by describing the eviction statutes in these terms:

> "They are designed as statutes for relief, not to create new causes of action. The evident intention is to give this summary relief in those cases where for breach of such [lease] stipulations the action of ejectment would lie. This throws every case upon the ground where the matter rests at common law, the statute having simply the effect of affording a speedy and summary restitution of the premises in cases where the party would otherwise be under the necessity of resorting to an action of ejectment." 3A G. Thompson, *Real Property* §1370, at 719 (1959 Rep. Vol.).

In brief, the procedures have been improved by statute but the substance has not been altered, and in this situation *Parsons v. Bedford* and a century of subsequent decisions of this Court confirm that the Seventh Amendment applies with full force and effect.[15]

Finally, in view of Southall's reference to the number of landlord and tenant cases initiated each year in the

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[15] AHC's other principal authorities are unhelpful to its position. It is not clear that the language it quotes from *Harris v. Barber*, 129 U.S. 366, 369 (1889), was directed to the District's statute at all and certainly it was not directed to the Seventh Amendment issue presented in this case. *Cameron v. United States*, 148 U.S. 301 (1893), involved a proceeding to remove unlawful fences, not an eviction proceeding. As for the state decisions, their treatment of jury trial in statutory eviction proceedings is not of great moment since the states are not subject to the Seventh Amendment (compare AHC Br. 13), but a large number of states do provide jury trials in such proceedings. See, *e.g.*, *Missildine v. Brightman*, 234 Iowa 1053, 14 N.W.2d 700 (1944), and other authorities cited at Pernell Br. 36, n. 37.

District, it is appropriate to refer briefly to this consideration. The same passage quoted by Southall's brief (pp. 30-31) demonstrates that about 97 percent of the cases filed never get beyond the threshold stage. *Tutt v. Doby*, 148 U.S. App. D.C. 171, 176, 459 F.2d 1195, 1200 (D.C. Cir. 1972). Almost all of the cases are terminated without trial as a result of default by the tenant, settlement of the action, or its abandonment by the landlord.

The statistics of the Superior Court show that even when jury trial could be demanded as a matter of course in the statutory eviction proceeding, it was sought only in a limited number of cases. Thus, in 1971, the year *before* the decision below terminated the prospect of jury trial in eviction cases,[16] only 650 jury demands were made in new landlord and tenant cases. 1971 *Annual Report of the District of Columbia Courts*, at A-8.[17] Of these 650 cases, the vast majority were then resolved without trial and 8 of the 17 cases actually brought to jury trial were settled in the course of the trial. *Id.* In short, there is no basis in past experience for any inference that the use of jury trials in landlord and tenant cases is unmanageable.

The conclusive answer to any such suggestion is, of course, the fact that jury trial has been available in

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[16]In 1971 the judges in the Superior Court were taking "conflicting positions" on whether a jury could be claimed in eviction proceedings (A. 14), but the Court of Appeals had not resolved the question. Accordingly, it was sensible for a tenant to demand a jury trial if, as in the present case, he wanted one.

[17]The annual report shows the following dispositions of the 650 cases: trial (17); judgment (162); settled (158); dismissed (106); no disposition (87); pending (13); jury withdrawn (94). *Id.*

eviction proceedings in the District of Columbia virtually throughout its history, until in 1970 the statutory guarantee was repealed without any intention by Congress to alter existing rights to jury trial. See Pernell Br. 3-6. Trial by jury continues to be provided in statutory eviction proceedings in a large number of states. *Id.* at 36, n.37. Since such proceedings may ultimately deprive a man and his family of their home, it is difficult to imagine a civil proceeding in which the intervention of a jury is more appropriate.

II. THE SEVENTH AMENDMENT GUARANTEES THE RIGHT OF JURY TRIAL WITH RESPECT TO THE TENANT'S CLAIMS FOR MONEY DAMAGES.

Independent of Pernell's right to trial by jury in defending against Southall's claim to possession, Pernell was also entitled to jury trial on his own claims for money damages against Southall. These claims were based on rent paid while the premises were not in a habitable condition and for expenditures made to render them habitable. The claims derive from the asserted breach by Southall of its implied warranty to maintain the premises in a habitable condition in accordance with the District's housing regulations (*Javins v. First National Realty Corp.*, 138 U.S. App. D.C. 369, 428 F.2d 1071, *cert. denied*, 400 U.S. 925 (1970)) and the claims represented the assertion of "the usual remedies for breach of contract." *Id.* at 369, 428 F.2d at 1071.[18]

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[18]Only recently, the District of Columbia Court of Appeals characterized the holding of *Javins* in these terms: "The court [in *Javins*] held that with respect to urban rental housing, there is

It is familiar law that contract claims for money damages are common law claims triable to a jury as of right. See, *e.g.*, *Simler v. Conner*, 372 U.S. 221 (1963). Pernell's opening brief (p. 46) showed that suits for breach of warranty have been frequent subjects of litigation in the common law courts ever since the Middle Ages, the action being cast originally in tort and, since the 1800's, more frequently in contract. In either event, the action is a common law suit triable to a jury. *Id.* at 44-47. None of these premises is disputed by Southall or AHC, nor could they fairly be disputed.

Southall's main response appears to be the dual contention that either Pernell was not actually seeking affirmative money damages or, alternatively, that the Constitution or local court rules forbid such claims in the statutory eviction proceeding. If these are indeed Southall's contentions, each of them is without merit. Pernell's answer in the trial court alleged that the premises rented had not been maintained by Southall in a safe and habitable condition and expressly "denie[d] that any rent is owing" to Southall (A. 11). In addition, Pernell expressly asserted money damage claims against Southall, based on payments of rent by him to Southall and on expenditures made to bring the premises into a more habitable condition (A. 13).

Under *Javins*, if Pernell had established at trial before a jury that the premises were not habitably maintained,

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implied by operation of law a warranty of habitability measured by the Housing Regulations of the District of Columbia. In so deciding, the court stated that leases of urban dwelling units should be interpreted and construed like any other contract." *Interstate Restaurants, Inc. v. Halsa Corp.*, 101 D.W.L.R. 1929, 1936 (D.C. Ct. App. 1973).

then the jury could have concluded that little or no rent was owing to Southall. 138 U.S. App. D.C. at 380-81, 428 F.2d at 1082-83. And, if the jury had also concluded that Pernell had paid rent to Southall in some amount and made further expenditures to bring the premises into habitable condition, thus fulfilling the landlord's own obligation, then under District law the jury could have awarded Pernell money damages for the amounts expended. See *Clover v. Shapiro*, 99 D.W.L.R. 1897 (D.C. Superior Ct. 1971).[19]

Since the jury is free to determine that the landlord's dereliction has wholly abated his right to rent, it could in this case have found that Pernell owed nothing whatever. If it also found that Pernell had in fact paid $75 in rent and expended $389.60 for repairs made to bring the premises into partial compliance with the District's housing regulations, then it could have awarded Pernell $464.60. Or, if the landlord's actions were found to reduce the amount of rent owing without eliminating it altogether, then Pernell would have been entitled to recover the difference between the amounts he paid or expended and any lesser sum which he was found to owe. See *Clover v. Shapiro, supra*, 99 D.W.L.R. at 1902.

What is apparent is that Pernell assuredly did make claims that, if sustained, would have entitled him to damages. The rules and decisions of the Superior Court of

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[19] *Clover* specifically considered the question whether the landlord's breach of his obligation under *Javins* could give rise to money damage claims and decided this question in the affirmative. Among the several alternative theories of recovery sustained in *Clover* were contractual claims both for rent paid and improvements made. 99 D.W.L.R. at 1901.

the District of Columbia contemplate that such recovery may be had in a statutory eviction proceeding. Landlord and Tenant Rule 5(b) provides that the tenant may respond to an eviction claim by making his own claim "for a money judgment based on the payment of rent or on expenditures claimed as credit against rent . . . ." The lower court in this case did not deny that such a claim could be made but merely asserted that the tenant was not entitled to trial by jury with respect to the claim.[20]

Southall's constitutional objection is still more far-fetched. Its brief seems to urge that it constitutes a denial of property without due process of law to permit the tenant to assert his affirmative money damage claims in an eviction proceeding. The brief states, for example, that "for a rule of court to be applied to compel a landlord to maintain a tenant with no right to possession in possession while the tenant asserts a claim for a money judgment raised as a legal defense by the tenant as a counterclaim is a deprivation of the landlord's property rights." Southall Br. 27. Southall's argument is lacking in logic and devoid of support in the precedents cited to sustain it.

Among other fallacies, Southall's argument ignores the fact that in the normal case both the landlord's eviction claim and the tenant's claim for damages grow out of a

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[20]Consequently, there is no need to discuss Southall's citation of cases from certain other jurisdictions in which tenants are not entitled to assert money damage claims in the course of eviction proceedings but are required to reserve them for separate proceedings after the eviction claims have been resolved. Southall Br. 28. Southall cannot rewrite the District's law by showing that the law is different in other jurisdictions.

common core of facts and present overlapping issues. Thus, it takes little added time to dispose of the tenant's damage claim in the same trial that resolves the landlord's right to possession. Moreover, Southall's reasoning appears to depend on the assumption that the landlord has a right to immediate possession of the property. But if Pernell's allegations were established, it would follow under District law that the landlord had no right to possession and, in addition, that Pernell had a right to money damages based upon the same default of the landlord that abated his own right to rent.

The cases cited by Southall in connection with its constitutional argument indicated only that it may be constitutionally *permissible* for a state to require in certain circumstances that an initial proceeding be confined to litigating the right to possession of property and that other claims or issues, which might normally be tried in the same proceeding, be reserved for subsequent litigation.[21] None of these cases held or even hinted that a state is constitutionally *compelled* to require such a separation in any circumstances, and, so far as the money damage claims asserted by Pernell are concerned, Landlord and Tenant Rule 5(b) expressly allows them to be asserted.[22]

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[21] See *Grant Timber & Mfg. Co. v. Gray*, 236 U.S. 133 (1915); *Bianchi v. Morales*, 262 U.S. 170 (1923); *Lindsey v. Normet*, 405 U.S. 56 (1972).

[22] Southall's constitutional claim is especially incongruous because Southall clearly could assert a money damage claim in the eviction proceeding for rent due against Pernell either by making personal service of the complaint, or even without such service, because Pernell had asserted his own money damage claims. See Landlord and Tenant Rule 3.

Not only is there no constitutional compulsion to separate related claims, but the plain trend of the law is in the opposite direction. Modern practice looks to the resolution in a single proceeding of all claims growing out of a common core of facts. *E.g.*, Fed. R. Civ. P. 13(a) (compulsory counterclaims); 14 (third-party claims); 23 (class actions). See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). This Court has also emphasized that, where possible, the same trier of fact should resolve related claims.[23] Whether resolution of related claims in a single proceeding is compelled by local rules or merely permitted, certainly the basic approach is not unconstitutional.

AHC's argument in opposition to a jury trial on Pernell's damage claims is not entirely clear but appears to have a two-fold aspect. Initially, AHC repeats the lower court's assertion that the obligation of a landlord to maintain habitable premises did not exist in 1791 and therefore that claims and defenses arising from such an obligation cannot be pursued in common law proceedings. AHC Br. 17-20. Pernell's claims, however, are contract claims based on a breach of warranty. While the particular contract term at issue is one designed for modern conditions, this does not alter the fact that it is sought to be enforced through a common law action which has been tried to a jury for centuries.

Plainly, many contract actions involve subjects and enforce substantive terms quite unfamiliar to residents of England in 1791, but trial by jury may not be withheld

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[23] *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963); *Katchen v. Landy*, 382 U.S. 323 (1966). See also *Beacon Theatres v. Westover*, 359 U.S. 500, 508 (1959).

on this account. See *Dairy Queen v. Wood*, 369 U.S. 469 (1962) (franchise agreement); *Simler v. Conner, supra* (contingent fee contract). It is the nature of the claim—which here involves contractual rights enforced through a request for money damages—that invokes the right to jury trial. See *Ross v. Bernhard, supra; Parsons v. Bedford, supra.*[24]

Alternatively, AHC also repeats the lower court's statement that Pernell was advancing "equitable" defenses of setoff and recoupment.[25] Pernell's opening brief (p. 48 & n.47) showed that recoupment is incontestably a long standing common law device and that setoff was enforced at law as well as equity prior to the Seventh Amendment. These devices could not in any event determine whether a particular claim is legal or equitable for Seventh Amendment purposes, because they do not relate to the nature of the claim but rather to *when* a responsive claim may be asserted in the same action by a defendant in response to a plaintiff's claim.[26]

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[24]The Uniform Commercial Code, for example, has significantly altered substantive common law doctrine in a number of respects. Yet no one would suggest that a contract suit for damages based on the Code would fall outside the Seventh Amendment because more modern rules have been adopted to govern commercial transactions.

[25]The lower court's characterization is obviously not controlling. A subordinate tribunal cannot by making findings or applying labels prevent the full and effective assertion of a constitutional right and, where those findings or labels are decisive, it is this Court that must make the ultimate determination. See, *e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

[26]Under the technical common law rules, recoupment permitted the defendant to reduce or eliminate a claim against him by

Since in this instance Southall's claims for money damages were based on breach of contract, they are necessarily common law claims triable to a jury.

Moreover, Pernell was not seeking merely to reduce or eliminate claims made by Southall which is the conventional office of recoupment and setoff. James §10.15, at 479. His pleadings specifically sought affirmative money damages on his own behalf. See p. 15, above. In conventional terms, Pernell's demand for affirmative relief is most appropriately described as a counterclaim.[27] Of course, legal as well as equitable claims may be asserted by way of counterclaim (*e.g., Beacon Theatres v. Westover, supra*) and in this case Pernell's demand was legal because of the nature of the underlying right and the remedy sought.

Finally, both Southall and AHC assert that Pernell has improperly relied on *Beacon Theatres, Inc. v. Westover, supra*, and *Dairy Queen, Inc. v. Wood, supra*. But the

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asserting to that extent his own claim against the plaintiff arising out of the same transaction; for example, a contractual claim by the seller based on the sale of goods could be reduced or eliminated by the buyer's responsive claim for breach of warranty of the goods sold. *E.g., Withers v. Greene*, 50 U.S. (9 How.) 213 (1850). Setoff performed the same basic function; unlike recoupment, however, the responsive claim did not have to arise out of the same transaction but it did need to be liquidated or easily subject to computation. F. James, *Civil Procedure* §10.15 (1965) (hereafter "James").

[27]Counterclaims "for a money judgment based on the payment of rent or on expenditures claimed as credit against rent" are expressly permitted by Landlord and Tenant Rule 5(b). Pernell's demand for affirmative relief was based both on payment of rent and on expenditures claimed as credit against rent.

nature of their attempted distinctions suggests that they have misapprehended the relevance of the cases in question to the present proceeding. See Southall Br. 22-25; AHC Br. 20. In those cases this Court addressed itself to the new situation created by the merger of law and equity, and it acknowledged a rule of priority normally to be applied where legal and equitable claims and defenses are asserted in the same proceeding.[28] The question of priority will never be reached, however, if this Court sustains Pernell's primary contentions.

Should this Court agree with Pernell that he is entitled to a trial by jury independently both on his defense of the eviction claim made by Southall and on his own assertion of contract claims for money damages, then no problem of priority is presented. On these premises, Pernell would be entitled to a jury trial on each claim if they were asserted in separate proceedings, and the right to jury trial obviously is not lost because two claims otherwise triable to a jury are combined in a single case. Thus, in the event this Court upholds Pernell's position, the question of priority as between legal and equitable issues cannot arise.

If, on the other hand, this Court concludes that Pernell is entitled to a jury trial with respect to one of the claims but not the other, then *Beacon Theatres* and *Dairy Queen*

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[28]Speaking of *Beacon Theatres* and *Dairy Queen*, this Court recently stated in *Ross v. Bernhard* that "under those cases, where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." 396 U.S. at 537-38.

would be relevant. Under the priority rule established by those cases, the host of factual issues common to the eviction claims and the claims for money damages should be submitted to the jury. See p. 22, n.28, above. Assuming that there may ever be circumstances in which the priority rule does not apply, no such circumstances have been or could be asserted in this case. Certainly there can be no contention here that Congress has made a specific determination to undo the usual order of trial favoring Seventh Amendment interests. Compare *Katchen v. Landy, supra.*[29]

If *Beacon Theatres* and *Dairy Queen* have any other significance, it lies in their repeated emphasis that every fair doubt is to be resolved in favor of trial by jury wherever the matter is within the control of a court subject to the Seventh Amendment. This principle is one of the oldest traditions of constitutional adjudication, harking back to decisions such as *Parsons v. Bedford, supra,* and continuing to the present day. *E.g., Ross v. Bernhard, supra.* And it rests upon deeply-felt benefits

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[29]The legislative history cited in Pernell's opening brief (p. 6) amply demonstrates that the statutory guarantee which assured civil jury trials in a broad class of cases, including eviction proceedings, was repealed because Congress believed it to be "superfluous in light of constitutional jury trial requirements." This showing is based on explicit language in the report of the House Committee, whose treatment of the matter prevailed (H. Rep. No. 91-907, 91st Cong., 2d Sess. 164 (1970)), and is obviously not impaired by showing that the Senate considered retaining the statutory guarantee for other reasons (AHC Br. 6, n. 4) or that a statutory guarantee of jury trial in criminal cases was retained in another portion of the District of Columbia Code (Southall Br. 19).

that derive from use of jury trial, including the common-sense judgment jurors apply to particular facts, "that flexibility of legal rules which is essential to justice and popular contentment," and its office "as a gratuitous public school" in which citizens share in their own self-government.[30]

Thus, "the federal policy favoring jury trials is of historic and continuing strength." *Simler v. Conner, supra*, 372 U.S. at 222. See also *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). In the present case, this tradition buttresses a claim to jury trial firmly rooted in history and policy alike. Taken together these considerations compel the conclusion that the right to trial by jury attaches both to the eviction claim and to the money damage claims asserted in response.

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[30]*Schulz v. Pennsylvania R.R.*, 350 U.S. 523, 526 (1956); Wigmore, "A Program for the Trial of Jury Trial," 12 *J. Am. Jud. Soc'y* 166, 170 (1929); 1 de Tocqueville, *Democracy in America* 296 (Bradley ed. 1945).

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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December 1973

PERNELL *v.* SOUTHALL REALTY

CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 72-6041. Argued February 19, 1974—Decided April 24, 1974

Since the right to recover possession of real property was a right ascertained and protected at common law, the Seventh Amendment of the Constitution entitles either party to demand a jury trial in an action to recover possession of real property in the Superior Court for the District of Columbia under § 16-1501 of the District of Columbia Code. Pp. 369-385.

294 A. 2d 490, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., and DOUGLAS, J., concurred in the result.

Norman C. Barnett argued the cause for petitioner. With him on the briefs was *Michael Boudin.*

Herman Miller argued the cause for respondent. With him on the brief was *Michael Ross.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether the Seventh Amendment guarantees the right to trial by jury in an action brought in the District of Columbia for the recovery of possession of real property. In May 1971, petitioner, Dave Pernell, entered into a lease agreement with respondent, Southall Realty, for the rental of a house in the District of Columbia. In July 1971, Southall filed a complaint in the Superior Court for the

**Allen G. Siegel* and *Daniel C. Kaufman* filed a brief for the Apartment House Council of Metropolitan Washington, Inc., as *amicus curiae* urging affirmance.

District of Columbia seeking to evict Pernell from the premises for alleged nonpayment of rent. Suit was brought under D. C. Code §§ 16–1501 through 16–1505, which establish a procedure for the recovery of possession of real property. In his answer, Pernell denied that rent was owing, asserted that Southall maintained the premises in an unsafe, unhealthy, and unsanitary condition in violation of the housing regulations of the District of Columbia,[1] and alleged that Southall breached an agreement to waive several months' rent in exchange for Pernell's making certain improvements on the property. Pernell also claimed a setoff of $389.60 for repairs made to bring the premises into partial compliance with the District's housing regulations and a counterclaim of $75 for back rent paid.

In his answer, Pernell also requested a trial by jury. The trial judge, however, struck the jury demand, tried the case himself, and entered judgment for Southall. Pernell appealed to the District of Columbia Court of Appeals, claiming that the Seventh Amendment guaranteed the right to trial by jury in all cases brought under § 16–1501 and, alternatively, that he was entitled to a jury trial in this case by virtue of the counterclaim and setoff specified in his answer. The Court of Appeals affirmed, 294 A. 2d 490 (1972), holding that jury trials are not guaranteed by the Seventh Amendment in landlord-tenant cases predicated on nonpayment of rent or some other breach of the lease where the only remedy sought is repossession of the rented premises. *Id.*, at 496. The court also held that if Pernell wished

[1] In the District of Columbia, a tenant may defend against eviction proceedings for nonpayment of rent on the ground that housing regulations have not been complied with and that the premises are not being maintained in a habitable condition by the landlord. See *Javins* v. *First Nat. Realty Corp.*, 138 U. S. App. D. C. 369, 428 F. 2d 1071, cert. denied, 400 U. S. 925 (1970).

to litigate his counterclaim for damages before a jury, he should have instituted a separate action rather than raise the counterclaim in the landlord's action for repossession. *Id.*, at 498.

Because of the novel nature of the Seventh Amendment question, we granted certiorari. 411 U. S. 915 (1973). We reverse.

I

Although the statutory cause of action now codified in § 16–1501 dates back to 1864,[2] it was unnecessary until recently for any court to pass upon the Seventh Amendment question now before us. Prior to 1970, D. C. Code § 13–702 preserved the right to jury trial "[w]hen the amount in controversy in a civil action . . . exceeds $20, and in all actions for the recovery of possession of real property . . . ." See, *e. g.*, *Kass* v. *Baskin*, 82 U. S. App. D. C. 385, 164 F. 2d 513 (1947). The matter now appears in a different light, however, since § 13–702 was repealed by the District of Columbia Court Reform and Criminal Procedure Act of 1970. See Pub. L. 91–358, § 142 (5)(A), 84 Stat. 552.

We are met at the outset by the suggestion that, notwithstanding the repeal of § 13–702, it might still be possible to interpret the relevant statutes as providing for a right to jury trial. It is, of course, a " 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.' " *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971).

The Court of Appeals recognized that "Congress did not make clear what it intended by the repeal of this section." 294 A. 2d, at 491. Although the legislative

[2] See Act of July 4, 1864, c. 243, 13 Stat. 383. See also *infra*, at 377–378.

history on this question is meager, an argument can be made that Congress in 1970 harbored no intent to do away with jury trials, but rather repealed § 13–702 as a housekeeping measure in the belief that jury trials would continue to be afforded in all cases previously covered by that section, including actions for the recovery of possession of real property.[3] The Court of Appeals, however, appears to have been of the view that, regardless of congressional intent, it was no longer possible to interpret the relevant statutes as providing a right to jury trial in light of the outright repeal of § 13–702. In its view, after 1970 the right to jury trial had to stand on constitutional ground if it were to stand at all. We find ourselves bound by that court's analysis of the effect of the 1970 Act in the circumstances of this case.

This Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application. See, *e. g.*, *Griffin* v. *United States*, 336 U. S. 704, 717–718 (1949); *Fisher* v. *United States*, 328 U. S. 463, 476 (1946). See also *Miller* v. *United States*, 357 U. S. 301, 306 (1958). In the past, this reluctance has typically

[3] The Senate version of the Court Reform Act retained a statutory guarantee of a right to jury trial almost identical to § 13–702. See S. 2601, 91st Cong., 1st Sess., § 202 (Sept. 16, 1969). While the House bill, which was adopted by the Conference Committee, did not contain a similar provision, the House Report seems to indicate that § 13–702 was not repealed in a conscious effort to change the practice of affording jury trial in actions to recover possession of real property, but was struck "as superfluous in light of constitutional jury trial requirements . . . ." H. R. Rep. No. 91–907, p. 164 (1970). See also H. R. 16196, 91st Cong., 2d Sess., § 142 (5)(A) (Mar. 13, 1970); H. R. Conf. Rep. No. 91–1303 (1970). It appears then that Congress itself believed that jury trials were constitutionally required in all actions previously covered by § 13–702 and would continue to be provided in such actions.

been expressed with regard to positions taken by the courts of the District on common-law questions of evidence and substantive criminal law. But in view of the restructuring of the District's court system accomplished by the Court Reform Act in 1970, we believe the same deference is owed the courts of the District with respect to their interpretation of Acts of Congress directed toward the local jurisdiction.

One of the primary purposes of the Court Reform Act was to restructure the District's court system so that "the District will have a court system comparable to those of the states and other large municipalities." H. R. Rep. No. 91–907, p. 23 (1970). Prior to 1970, the District's local courts and the United States District Court and Court of Appeals for the District of Columbia Circuit, unlike their counterparts in the several States, shared a complex and often confusing form of concurrent jurisdiction, with local-law matters often litigated in the United States District Court and decisions of the District of Columbia Court of Appeals reviewable in the United States Court of Appeals for the District of Columbia Circuit. See generally *ibid.*

The 1970 Act made fundamental changes in this structure. The District of Columbia Court of Appeals was made the highest court of the District, "similar to a state Supreme Court," and its judgments made reviewable by this Court in the same manner that we review judgments of the highest courts of the several States. See *ibid.* See also Pub. L. 91–358, § 111, 84 Stat. 475, codified at D. C. Code § 11–102; § 172 (a)(1), 84 Stat. 590, amending 28 U. S. C. § 1257. The respective jurisdictions of the newly created Superior Court of the District of Columbia and of the United States District Court for the District of Columbia were adjusted so as to "result in a Federal-State court system in the District of Columbia

analogous to court systems in the several States." H. R. Rep. No. 91–907, *supra*, at 35.

This new structure plainly contemplates that the decisions of the District of Columbia Court of Appeals on matters of local law—both common law and statutory law—will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law.[4] Congressional Acts directed toward the District, like other federal laws, admittedly come within this Court's Art. III jurisdiction, and we are therefore not barred from reviewing the interpretations of those Acts by the District of Columbia Court of Appeals in the same jurisdictional sense that we are barred from reconsidering a state court's interpretation of a state statute. See, *e. g.*, *O'Brien* v. *Skinner*, 414 U. S. 524, 531 (1974); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 256 (1974). But the new court structure certainly lends additional sup-

[4] We do not intend to imply that the District of Columbia Superior Court and Court of Appeals must be treated as state courts for all purposes. Cf. *District of Columbia* v. *Carter*, 409 U. S. 418 (1973). There are apparently several questions as yet unresolved concerning the relationship between the District of Columbia local courts and the United States District Court and the United States Court of Appeals for the District of Columbia Circuit. Among these are whether the United States District Court has jurisdiction under either 28 U. S. C. § 2254 or § 2255 to hear habeas corpus petitions brought by persons in confinement by virtue of convictions had in the District of Columbia Superior Court and, if it does not, whether this Court has a special obligation to resolve conflicts between the District's "local" and "federal" courts on questions of constitutional law raised in such petitions. See D. C. Code §§ 16–1901 through 16–1909. Other unresolved questions involve the extent to which the principles of *Younger* v. *Harris*, 401 U. S. 37 (1971), and related cases apply to the relationship between the District's two court systems. See generally *Sullivan* v. *Murphy*, 156 U. S. App. D. C. 28, 50–54, 478 F. 2d 938, 960–964, cert. denied, 414 U. S. 880 (1973). We, of course, express no views on these issues.

port to our longstanding practice of not overruling the courts of the District on local law matters "save in exceptional situations where egregious error has been committed." *Fisher* v. *United States,* 328 U. S., at 476; *Griffin* v. *United States,* 336 U. S., at 718. This principle, long embedded in practice and now supported by the clear intent of Congress in enacting the 1970 Court Reform Act, must serve as our guide in the present case. As no such obvious error was committed here, we must accept the Court of Appeals' conclusion that the right to jury trial must stand or fall on constitutional ground after the repeal of § 13–702. Accordingly, it is to the Seventh Amendment issue that we now turn.

II

D. C. Code § 16–1501 provides a remedy "[w]hen a person detains possession of real property without right, or after his right to possession has ceased . . . ." The statute is not limited to situations where a landlord seeks to evict a tenant, but may be invoked by any "person aggrieved" by a wrongful detention of property. *Ibid.* See also *infra,* at 379. Under the statute, when a verified complaint is filed by the person aggrieved by the detention, the Superior Court of the District of Columbia may issue a summons to the defendant to appear and show cause why judgment should not be given against him for the restitution of possession. This summons must be served seven days before the day fixed for the trial of the action. D. C. Code § 16–1502. If, after the trial, it appears that the plaintiff is entitled to possession, judgment and execution for possession shall be awarded in his favor with costs. If, on the other hand, the plaintiff nonsuits or fails to prove his case, the defendant shall have judgment and execution for his costs. See D. C. Code § 16–1503.

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." Like other provisions of the Bill of Rights, it is fully applicable to courts established by Congress in the District of Columbia. See *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 5 (1899).

This Court has long assumed that actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury. In *Whitehead* v. *Shattuck*, 138 U. S. 146, 151 (1891), for example, we recognized that

> "[i]t would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law . . . ; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law."

See also *Scott* v. *Neely*, 140 U. S. 106, 110 (1891); *Ross* v. *Bernhard*, 396 U. S. 531, 533 (1970).

Respondent suggests, however, that these precedents should be limited to actions to recover property where title is in issue and that actions brought under § 16–1501 should be distinguished as actions for the recovery of possession where claims of title are irrelevant.[8] The

[8] Prior to the enactment of the Court Reform Act in 1970, D. C. Code § 16–1504 provided that if the defendant in an action brought under § 16–1501 pleads title in himself or in another under whom he claims, and provides a surety to pay damages, costs, and reasonable intervening rent for the premises, the court (then the District of Columbia Court of General Sessions) shall certify the proceedings to the United States District Court for the District of Columbia. Today a rule of the Superior Court provides that

distinction between title to and possession of property, of course, was well recognized at common law. See *Grant Timber & Mfg. Co.* v. *Gray*, 236 U. S. 133, 134 (1915). But however relevant it was for certain purposes, it had no bearing on the right to a jury trial. The various forms of action which the common law developed for the recovery of possession of real property were also actions at law in which trial by jury was afforded.

Over the course of its history, the common law developed several possessory actions. Among the earliest of these was the assize of novel disseisin which developed in the latter half of the 12th century and permitted one who had been recently disseised of his tenement to be put back into seisin by judgment of the King's court.[6] Trial by assize represented one of the earliest forms of trial by jury. After the plaintiff lodged his complaint, a writ would issue bidding the sheriff to summon 12 good and lawful men of the neighborhood to "recognize" before the King's justices[7] whether the defendant had

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when an issue of title intrudes in an action brought under § 16–1501, the case is transferred from the Landlord and Tenant Branch which normally tries actions under § 16–1501 to the regular Civil Division. See 294 A. 2d 490, 492 and n. 8.

[6] See F. Maitland, The Forms of Action at Common Law 27–29 (1936); 1 F. Pollock & F. Maitland, The History of English Law 145–147 (2d ed. 1899); 3 W. Blackstone, Commentaries *187–188. Novel disseisin, like the action now embodied in § 16–1501, was designed primarily as a possessory action to permit one who had been ejected from his land to be restored to possession. If the ejector wished to raise questions of title, he could proceed later in a separate action. See T. Plucknett, A Concise History of the Common Law 341 (4th ed. 1948). See also *Grant Timber & Mfg. Co.* v. *Gray*, 236 U. S. 133, 134 (1915). Cf. n. 5, *supra*.

[7] See, *e. g.*, Maitland, *supra*, n. 6, at 83–84. Unlike the forcible entry and detainer remedy discussed *infra*, at 376–381, assizes of novel disseisin were presided over by a judge of the King's court rather than a justice of the peace. See *ibid*. The use of itinerant

unjustly disseised the plaintiff of his tenement.[8] Like the modern cause of action embodied in § 16–1501, novel disseisin was a summary procedure designed to mete out prompt justice in possessory disputes.[9]

Writs of entry, dating from about the same period, were developed to encompass situations not covered by the assize of novel disseisin. Novel disseisin, for example, was applicable only where the defendant gained possession wrongfully by putting the plaintiff out of seisin. Writs of entry, in contrast, permitted recovery where the defendant entered into possession lawfully but no longer had rightful possession.[10] Indeed, one of the writs of entry, the writ of entry *ad terminum qui praeterit*, could be used by a plaintiff to recover lands from a defendant who had originally held them for a term of years, which term had expired.[11] The writ, in other words, embodied a cause of action quite similar to that

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justices of the King's court to travel around the countryside on a regular basis to preside over the assizes was confirmed in Magna Carta, c. XII (1225). See also 1 Pollock & Maitland, *supra*, n. 6, at 155–156.

[8] In its origin trial by assize was slightly different from trial by jury as we know it today. In particular the jurors, or "recognitors" as they were then known, were summoned by the original writ and asked to answer a question posed by the writ itself as contrasted to the modern practice whereby jurors are not called into a case until it appears that questions of fact are raised by the pleadings. See generally 1 W. Holdsworth, A History of English Law 330–331 (1927). In course of time, however, the recognitors summoned by the writ of novel disseisin assumed the functions of a modern jury. See 1 Pollock & Maitland, *supra*, n. 6, at 149; Maitland, *supra*, n. 6, at 35.

[9] See Maitland, *supra*, n. 6, at 29; M. Hale, The History of the Common Law 175 (4th ed. 1779).

[10] See Maitland, *supra*, n. 6, at 44–46; Plucknett, *supra*, n. 6, at 342–343.

[11] *Id.*, at 343; Maitland, *supra*, n. 6, at 39; 3 Blackstone, *supra*, n. 6, at *183 n. z.

encompassed in § 16–1501. Significantly for present purposes, it is clear that either party could demand a jury trial.[12]

Both of these forms of action, though not legally abolished until well into the 19th century,[13] had fallen into disuse by the time our Constitution was drafted. By then, ejectment had become the most important possessory action. Ejectment originated as a very narrow remedy, designed to give the lessee of property a cause of action against anyone who ejected him, including his lessor.[14] But by a variety of intricate fictions, ejectment eventually developed into the primary means of trying either the title to or the right to possession of real property.[15]

In particular, ejectment became the principal means employed by landlords to evict tenants for overstaying the terms of their leases, nonpayment of rent, or other breach of lease covenants.[16] Had Southall Realty

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[12] Maitland, *supra*, n. 6, at 39.

[13] See 3 & 4 Will. 4, c. 27, § 36 (1833).

[14] Maitland, *supra*, n. 6, at 47; Plucknett, *supra*, n. 6, at 354; 3 Blackstone, *supra*, n. 6, at *199.

[15] The classic fiction was used where two persons wished to try the title to land. One of them leased it to an imaginary person and the other leased it to another imaginary person. One imaginary lessee "ejects" the other, and in order to try the right to possession of the rival imaginary lessees, the court must necessarily decide which of the real lessors had title to the land. See Maitland, *supra*, n. 6, at 57; 3 Blackstone, *supra*, n. 6, at *199–204. Cf. *M'Arthur* v. *Porter*, 6 Pet. 205, 211 (1832).

[16] See, *e. g.*, *Little* v. *Heaton*, 1 Salk. 259, 91 Eng. Rep. 227 (Q. B. 1702); *Roe d. West* v. *Davis*, 7 East 363, 103 Eng. Rep. 140 (K. B. 1806); *Right d. Flower* v. *Darby*, 1 T. R. 159, 99 Eng. Rep. 1029 (K. B. 1786); *Doe d. Spencer* v. *Godwin*, 4 M. & S. 265, 105 Eng. Rep. 833 (K. B. 1815); *Doe d. Ash* v. *Calvert*, 2 Camp. 387, 170 Eng. Rep. 1193 (N. P. 1810). Indeed, the use of ejectment in landlord-tenant disputes became so widespread that a statute was

leased a home in London in 1791 instead of one in the District of Columbia in 1971, it no doubt would have used ejectment to seek to remove its allegedly defaulting tenant. And, as all parties here concede, questions of fact arising in an ejectment action were resolved by a jury.[17]

Notwithstanding this history, the Court of Appeals reasoned that an action under § 16–1501 was not the "equivalent" of an action of ejectment. 294 A. 2d, at 492. It noted that another section of the D. C. Code sets forth a more specific action of ejectment.[18] Moreover, the expedited character of a § 16–1501 proceeding was seen as contrasting sharply with the archaic limitations and cumbersome procedures that marked the common-law action of ejectment. *Ibid.* Since, in its opinion, neither § 16–1501 nor its equivalent existed at common law, the Court of Appeals held that the Seventh Amendment did not guarantee the right to jury trial.

In our view, this analysis is fundamentally at odds with the test we have formulated for resolving Seventh Amendment questions. We recently had occasion to note that while "the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time." *Curtis* v. *Loether*, 415 U. S. 189, 193 (1974). The phrase "suits at common law" includes not only suits

"which the *common* law recognized among its old

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enacted to simplify its application to these cases. See 4 Geo. 2, c. 28 (1731).

[17] See *Whitehead* v. *Shattuck*, 138 U. S. 146 (1891). See also *Doe d. Cheny* v. *Batten*, 1 Cowp. 243, 98 Eng. Rep. 1066 (K. B. 1775); *Goodright d. Charter* v. *Cordwent*, 6 T. R. 219, 101 Eng. Rep. 520 (K. B. 1795).

[18] D. C. Code § 16–1124. This statute is apparently derived from 4 Geo. 2, c. 28, §§ 2–4 (1731). See n. 16, *supra*.

> and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830) (emphasis in original).

Whether or not a close equivalent to § 16–1501 existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty. See *Curtis* v. *Loether, supra,* at 195.

The proceeding established by § 16–1501, while a far cry in detail from the common-law action of ejectment, serves the same essential function—to permit the plaintiff to evict one who is wrongfully detaining possession and to regain possession himself. As one commentator has noted, while statutes such as § 16–1501 were "unknown to the common law . . . [t]hey are designed as statutes for relief, not to create new causes of action. The evident intention is to give this summary relief in those cases where . . . the action of ejectment would lie." [19] Indeed, the courts of the District themselves have frequently characterized the action created in § 16–1501 as a "substitute" for an ejectment action.[20] Moreover, it appears

[19] See 3A, G. Thompson, Real Property § 1370, pp. 718–719 (1959).

[20] See, *e. g., Shapiro* v. *Christopher,* 90 U. S. App. D. C. 114, 123, 195 F. 2d 785, 794 (1952); *Service Parking Corp.* v. *Trans-Lux*

that every action recognized in 1791 for the recovery of possession of property carried with it the right to jury trial. Neither respondent nor the Court of Appeals was able to point to any equitable action even remotely resembling § 16–1501. Since the right to recover possession of real property governed by § 16–1501 was a right ascertained and protected by courts at common law, the Seventh Amendment preserves to either party the right to trial by jury.

III

Respondent argues, however, that the closest historical analogue to § 16–1501 was neither an action at law nor an action in equity, but rather a forcible entry and detainer statute enacted in the reign of Henry VI. See 8 Hen. 6, c. 9 (1429). That statute made it unlawful to "make any forcible Entry in Lands and Tenements, or other Possessions, or them hold forcibly." *Id.*, § II. Justices of the peace were directed to enforce its provisions. If complaint were made, they were to inquire into the matter and any persons found holding a place forcibly were to "be taken and put in the next Gaol, there to remain convict by the Record of the same Justices or Justice, until they have made Fine and Ransom to the King." *Id.*, § I. The justices of the peace were also empowered "to reseize the Lands and Tenements so entered or holden as afore, and shall put the Party so put out in full Possession of the same Lands and Tenements . . . ." *Id.*, § III.

While respondent's argument is lent some support by the fact that § 16–1501 is presently captioned "Forcible Entry and Detainer," closer examination of the per-

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Radio City Corp., 47 A. 2d 400, 403 (D. C. Mun. App. 1946); *Shipley* v. *Major*, 44 A. 2d 540, 541 (D. C. Mun. App. 1945).

tinent history reveals that respondent has misconstrued the actual relationship between the two statutes.

The first predecessor of § 16–1501 was the Act of July 4, 1864, c. 243, 13 Stat. 383.[21] That Act provided a remedy for three separate situations: "when forcible entry is made"; "when a peaceable entry is made and the possession unlawfully held by force"; and "when possession is held without right, after the estate is determined by the terms of the lease by its own limitation, or by notice to quit, or otherwise . . . ." See *id.*, § 2.

There is no question but that the first two of these remedies—for forcible entry or for peaceable entry followed by possession unlawfully held by force—can be traced directly to the statute of Henry VI.[22] The English statute, however, had no provision like that in the 1864 Act specifically designed for landlord-tenant disputes.

In 1953, Congress amended the 1864 Act and did away entirely with the provisions relating to forcible entry and peaceable entry with possession unlawfully held by force which can be traced to the English statute. See Act of June 18, 1953, c. 130, 67 Stat. 66. In its place, Congress enacted a general provision dealing with unlawful detention of property which could be invoked,

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[21] Prior to 1864, landlord-tenant disputes in the District of Columbia were governed by a Maryland statute, Act of Maryland of 1793, c. 43, 2 W. Kilty, Laws of Maryland (1800), which was incorporated into the laws of the District by the Act of Feb. 27, 1801, c. 15, 2 Stat. 103.

[22] The 1864 Act was essentially the same as an 1836 Massachusetts statute. See *Willis* v. *Eastern Trust & Banking Co.*, 169 U. S. 295 (1898). Those parts of the Massachusetts Act involving forcible entry and forcible detainer were derived from the English forcible entry and detainer statutes, including that of Henry VI. See *Page* v. *Dwight*, 170 Mass. 29 (1897); *Boyle* v. *Boyle*, 121 Mass. 85 (1876).

like § 16–1501 today, "[w]henever any person shall detain possession of real property without right, or after his right to possession shall have ceased . . . ." *Ibid.*

Not only is the historical nexus between the two statutes weak, it is also evident that the English forcible entry and detainer statute and § 16–1501 serve totally different functions. While the English statute provided for the restitution of possession in appropriate cases, it was essentially a criminal provision, prosecuted through the usual criminal process.[23] The gravamen of the offense was the use of violence in obtaining or detaining possession.[24] The question in an action brought under the English statute was not who had the better right to possession. If one with the better right used force to oust another, he could be made to relinquish possession to the party he ousted and would be remitted to seeking legal process to obtain his rightful possession. As Blackstone states, there was no "inquiring into the merits of the title: for the force is the only thing to be tried, punished, and remedied . . . ."[25]

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[23] Suits were brought, for example, in the name of the State. See, *e. g.*, *The King* v. *Wilson*, 8 T. R. 357, 101 Eng. Rep. 1432 (K. B. 1799); *The King* v. *Harris*, 1 Salk. 260, 91 Eng. Rep. 229 (K. B. 1699); *The King* v. *Dormy*, 1 Salk. 260, 91 Eng. Rep. 229 (K. B. 1700). The case was brought by way of indictment. See *Ford's Case*, Cro. Jac. 151, 79 Eng. Rep. 132 (K. B. 1607); W. Woodfall, Landlord and Tenant 814 (12th ed. 1881).

[24] See *The King* v. *Wilson*, *supra*. It appears that in order for the entry to be forcible, it had to be accompanied by actual violence or terror, such as assault, the breaking open of doors, or the carrying away of the other party's goods. See Woodfall, *supra*, n. 23. See also 4 Blackstone, *supra*, n. 6, at *148. The use of actual force was a prerequisite to recovery under the forcible entry and detainer provisions of the 1864 Act applicable to the District of Columbia prior to 1953. See *Thurston* v. *Anderson*, 40 A. 2d 342 (D. C. Mun. App. 1944).

[25] 4 Blackstone, *supra*, n. 6, at *148. See *Iron M. & H. R. Co.* v. *Johnson*, 119 U. S. 608 (1887).

In contrast, § 16–1501 is not a criminal action intended to redress the use of force, but rather was designed as a general civil remedy to determine which of two parties has the better legal right to possession of real estate. And, in this respect, § 16–1501 is not limited, as was the 1864 Act, to landlord-tenant disputes, but has been held to encompass, for example, suits by a purchaser at a foreclosure sale to evict the former owner,[26] by the heir of property to evict the current occupant,[27] and by a tenant in common seeking to share possession of the premises.[28]

Even were we to accept respondent's contention that the statute of Henry VI provides the closest common-law analogue for § 16–1501, that would lend no support to its argument that no right to jury trial should be recognized in actions under § 16–1501. The fact of the matter is that jury trials before justices of the peace were afforded in actions to recover possession of property brought under the statute of Henry VI.[29] Indeed, the statute itself provides for jury trials.[30]

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[26] See, *e. g.*, *Glenn* v. *Mindell*, 74 A. 2d 835 (D. C. Mun. App. 1950); *Surratt* v. *Real Estate Exchange*, 76 A. 2d 587 (D. C. Mun. App. 1950); *Sayles* v. *Eden*, 144 A. 2d 895 (D. C. Mun. App. 1958).

[27] See, *e. g.*, *Mahoney* v. *Campbell*, 209 A. 2d 791 (D. C. Ct. App. 1965).

[28] See, *e. g.*, *Bagby* v. *Honesty*, 149 A. 2d 786 (D. C. Mun. App. 1959).

[29] See 4 Blackstone, *supra*, n. 6, at *148. See, *e. g.*, *Ford's Case*, Cro. Jac. 151, 79 Eng. Rep. 132 (K. B. 1607). C. Beard, The Office of Justice of the Peace in England 68 (1904).

[30] "And also when the said Justices or Justice make such Inquiries as before, they shall make, or one of them shall make, their Warrants and Precepts to be directed to the Sheriff of the same County, commanding him of the King's Behalf to cause to come before them, and every of them, sufficient and indifferent Persons, dwelling next about the Lands so entered as before, to inquire of such Entries . . . ." 8 Hen. 6, c. 9, § IV (1429).

Respondent claims, however, that this trial by jury before a justice of the peace was not a trial by jury as that concept came to be established in the Seventh Amendment. Respondent relies primarily on our decision in *Capital Traction Co.* v. *Hof*, 174 U. S. 1 (1899), where the Court held that trial by a jury before a justice of the peace presiding over a small claims suit in the District of Columbia was not a trial by jury in the constitutional sense. This Court reasoned in *Hof* that the District's justice of the peace

> "was not, properly speaking, a judge, or his tribunal a court; least of all, a court of record. The proceedings before him were not according to the course of the common law.... [The Act which permitted him to try cases with a jury] did not require him to superintend the course of the trial or to instruct the jury in matter of law; nor did it authorize him, upon the return of their verdict, to arrest judgment upon it, or to set it aside, for any cause whatever; but made it his duty to enter judgment upon it forthwith, as a thing of course. A body of men, so free from judicial control, was not a common law jury; nor was a trial by them a trial by jury, within the meaning of the Seventh Amendment to the Constitution." *Id.*, at 38–39.

We think respondent's reliance on *Hof* is misplaced. Although containing broad language to this effect, see *id.*, at 18, *Hof* does not stand for the proposition that a trial by jury before a justice of the peace was totally unknown at common law. Rather, *Hof* relied on the fact that at common law, justices of the peace had no jurisdiction whatever over civil suits similar to the small claims action involved in that case. *Id.*, at 16. A trial before a justice of the peace in this kind of case,

with or without a jury, was therefore unknown at common law, and could not have been within the contemplation of the Seventh Amendment. *Id.*, at 18.

The Court recognized in *Hof*, however, that English justices of the peace did have criminal jurisdiction. *Id.*, at 16. And, as we have seen, this criminal jurisdiction extended to trial of forcible entry and detainers and included trial by jury. History plainly reveals that a trial by jury before a justice of the peace in England, unlike trial before a justice of the peace in the District of Columbia, was a jury trial in the full constitutional sense. English justices of the peace were required to be learned in the law. They were judges of record and their courts, courts of record. The procedures they followed differed in no essential manner from that of the higher court of assize held by the King's judges. Trial by jury before the justices of the peace proceeded in the usual manner of a criminal trial by jury in the King's court.[31] Respondent's attempted analogy between § 16–1501 and the English forcible entry and detainer statute, rather than cutting against a right to jury trial in the present case, lends further support to our conclusion that § 16–1501 encompasses rights and remedies which were enforced, at common law, through trial by jury.[32]

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[31] See generally Beard, *supra*, n. 29, at 158–164; McVicker, The Seventeenth Century Justice of Peace in England, 24 Ky. L. J. 387, 392, 403–407 (1936).

[32] Respondent also relied on the fact that the procedure applicable to landlord-tenant disputes in the District of Columbia between 1801 and 1864, which had been incorporated from Maryland law, see n. 21, *supra*, also involved a jury of 12 before a justice of the peace. The Maryland Act embodied a summary means of recovering possession of lands held by tenants after the expiration of their terms, and provided that upon complaint, two justices of the peace shall, through a sheriff, summon 12 good and lawful men of the country to appear before the justices to determine whether resti-

IV

The Court of Appeals also relied on our opinion in *Block* v. *Hirsh*, 256 U. S. 135 (1921), where we faced a challenge to the constitutionality of a statute transferring actions to recover possession of real property from the courts to a rent control commission. It was there argued that the statute deprived both landlords and tenants of their right to trial by jury. The Court, speaking through Mr. Justice Holmes, rejected this suggestion:

> "The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land.

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tution of the land should be made to the lessor. See Act of Maryland of 1793, c. 43, 2 W. Kilty, Laws of Maryland (1800).

The Court of Appeals found that this mode of trial, like the procedure involved in *Hof*, was something less than a trial by jury in the constitutional sense. It therefore reasoned that there was no unbroken history of trial by jury in landlord-tenant actions in the District of Columbia and believed this lent additional support to its conclusion that no jury trial was required by the Constitution. 294 A. 2d, at 495.

We disagree. To begin with, the Maryland statute involves a specialized cause of action, limited to landlord-tenant disputes, quite different from § 16–1501, which, as indicated earlier, is a general provision encompassing all disputes over the possession of land. See *supra*, at 379. Moreover, there is no indication, and the court below did not find, that § 16–1501 or any of its predecessor Acts were derived from this Maryland law. See *supra*, at 377–378. Whether or not jury trials were constitutionally required in the Maryland action after it was incorporated into the law of the District of Columbia, and whether or not the procedure actually afforded between 1801 and 1864 amounted to a full jury trial under our decision in *Hof*, are therefore irrelevant to the issue presented in this case. We have no occasion to decide, over 100 years after the fact, whether in suits brought between 1801 and 1864 under this now defunct landlord-tenant statute, parties were denied their Seventh Amendment rights.

> If the power of the Commission established by the statute to regulate the relation is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable." *Id.*, at 158.

The Court of Appeals reasoned that we "could scarcely have made this observation if the right to jury trial was conferred by the Constitution." 294 A. 2d, at 496. We think the Court of Appeals misunderstood the rationale of this case. *Block* v. *Hirsh* merely stands for the principle that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication. See *Curtis* v. *Loether*, 415 U. S., at 194. See also *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). We may assume that the Seventh Amendment would not be a bar to a congressional effort to entrust landlord-tenant disputes, including those over the right to possession, to an administrative agency. Congress has not seen fit to do so, however, but rather has provided that actions under § 16–1501 be brought as ordinary civil actions in the District of Columbia's court of general jurisdiction. Where it has done so, and where the action involves rights and remedies recognized at common law, it must preserve to parties their right to a jury trial. *Curtis* v. *Loether*, *supra*, at 195.

The Court of Appeals appeared troubled by the burden jury trials might place on the District's court system and by the possibility that a right to jury trial would conflict with efforts to expedite judicial disposition of landlord-tenant controversies. We think it doubtful, however, that the right to a jury trial would significantly impair these important interests. As indicated earlier,

the right to trial by jury was recognized by statute for over a century from 1864 to 1970,[33] and it does not appear to have posed any unmanageable problems during that period.

In the average landlord-tenant dispute, where the failure to pay rent is established and no substantial defenses exist, it is unlikely that a defendant would request a jury trial. And, of course, the trial court's power to grant summary judgment where no genuine issues of material fact are in dispute provides a substantial bulwark against any possibility that a defendant will demand a jury trial simply as a means of delaying an eviction. More importantly, however, we reject the notion that there is some necessary inconsistency between the desire for speedy justice and the right to jury trial. We note, for example, that the Oregon landlord-tenant procedure at issue in *Lindsey* v. *Normet*, 405 U. S. 56 (1972), although providing for a trial no later than six days after service of the complaint unless the defendant provided security for accruing rent, nevertheless guaranteed a right to jury trial. Many other States similarly provide for trial by jury in summary eviction proceedings.[34]

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[33] The Act of July 4, 1864, c. 243, 13 Stat. 383, contemplated determination of the suit by a justice of the peace with appeal to the Supreme Court of the District and trial *de novo* before a jury. See, *e. g.*, *Luchs* v. *Jones*, 8 D. C. (1 MacArthur) 345 (D. C. Supreme Ct. 1874). Subsequent legislation, up to 1970, carefully preserved the right to jury trial. See, *e. g.*, Act of Mar. 3, 1901, c. 854, §§ 20–24 and 80, 31 Stat. 1193 and 1201; Act of Mar. 3, 1921, c. 125, § 3, 41 Stat. 1310.

[34] *E. g.*, Ariz. Rev. Stat. Ann. § 12–1176 (1956); Colo. Rule Civ. Proc. 38 (a) (1970); Ga. Code Ann. §§ 105–1601, 105–1602 (1966); Ill. Rev. Stat., c. 57, § 11a (1973); Ind. Ann. Stat. § 3–1605 (1968); Cal. Civ. Proc. Code § 1171 (1972); Conn. Gen. Stat. Rev. § 52–463 (1973); Kan. Stat. Ann. § 61–2309 (Supp. 1974); Ky. Rev. Stat. Ann. § 383.210 (1972); Mich. Stat. Ann. § 27A.5738 (Supp. 1974);

Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.

Reversed and remanded.

THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur in the result.

N. Y. Real Prop. Actions § 745 (1963); Ohio Rev. Code Ann. § 1923.10 (1968).